Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC., a New York corporation,

Petitioners,

v.

CINERGI PRODUCTIONS, INC., a California corporation,
CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation,
ANDREW G. VAJNA and RANDOLPH M. PAUL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the right of privacy guaranteed to all persons under the United States Constitution precludes a state trial court from compelling *in camera* production of a patient's entire diary or journal created at the direction of a psychotherapist and maintained solely in connection with the psychotherapist-patient relationship when only one brief passage in the diary could possibly be relevant to the lawsuit.

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parties or subsidiary companies which are required to be listed.

Petitioners herein and plaintiffs in action below:	Laurence Fishburne The LOA Productions, Inc.
Respondents herein and defendants in action below:	Cinergi Productions, Inc. Cinergi Pictures Entertainment Inc. Andrew G. Vajna Randolph M. Paul
Cross-complainant in action below:	Randolph M. Paul
Cross-defendant in action below:	Clifford Stevens

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OPINIONS BELOW

The ruling of the Supreme Court of California is unreported. (App. 39). The Ruling of the California Court of Appeal is unreported. (App. 36-37). The rulings of the Superior Court of the State of California are unreported. (App. 16-17, 18-20). The rulings of the private Discovery Referee in the action below are unreported. (App. 1-12, 13-15).

JURISDICTION

The Superior Court of the State of California entered its original Order on August 10, 1995 (App. 16-17); Petitioners' timely Motion for Reconsideration or Modification was denied in part and granted in part by the Superior Court on September 14, 1995 (App. 18-20); Petitioners' timely petition for Writ of Mandate was denied by the California Court of Appeal, Second Appellate District, on November 1, 1995 (App. 36-37); Petitioners' timely petition for Review was denied by the California Supreme Court on November 15, 1995. (App. 39).[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

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1. Petitioners attempted to file a Motion for Reconsideration with the Supreme Court of California on November 17, 1995 (App. 83-100). Petitioners' motion was rejected.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of

the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTES AND RULES INVOLVED IN THIS CASE

Although not directly implicated, Rule 501 of the Federal Rules of Evidence is discussed *infra*:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

NATURE OF THE CASE AND PROCEDURAL HISTORY

The Underlying Claims

Petitioners Laurence Fishburne ("Fishburne") and The LOA Productions, Inc. ("LOA") contend that they entered into a contract with Respondents herein ("Defendants") through which Fishburne would appear in the role of "Zeus" in the second starring position opposite of Bruce Willis in the hit movie, *Die Hard With A Vengeance* (the "Movie"). Defendants contacted Petitioners' representatives in April 1994 to secure Fishburne's services for the Movie. After determining that Fishburne would be available to render his acting services for the Movie during Defendants' anticipated production schedule, the parties quickly agreed upon the compensation to be paid to Petitioners on a "pay or play" basis. The parties then concluded an agreement on the "billing and credit" to be afforded to Fishburne for his role in the Movie. Notwithstanding this agreement on all material terms, Defendants in mid-June 1994 repudiated the agreement and replaced Fishburne with another actor (for significantly lower compensation).

Fishburne filed suit against Defendants for breach of their contract as well as for Defendants' fraudulent misrepresentations. None of Fishburne's claims and allegations in the lawsuit below seek damages for emotional distress, and Petitioners have expressly disclaimed damages for emotional or mental distress except for the routine distress which would naturally result from Defendants' alleged fraud.

The Dispute Concerning Laurence Fishburne's Diary

During discovery, Defendants sought to compel discovery of, among other things, Fishburne's psychotherapy diary which contained one entry relating to the Movie. The uncontroverted record below, however, establishes that this diary was created and maintained at the specific direction of Fishburne's psychotherapist, for the sole purpose of facilitating Fishburne's psychotherapy sessions, and was maintained in a strictly confidential manner. Under these facts, the discovery referee ruled that Fishburne's diary, created and maintained at the direction of his psychotherapist for the purpose of facilitating his psychotherapy sessions, was not discoverable and was in fact privileged under the statutory psychotherapist-patient privilege under California law. (App. 1-12). In so ruling, the discovery referee did not reach and did not address Fishburne's constitutional rights of privacy. (App. 13-15).

Upon Defendants' objections to that ruling, the Superior Court reversed that ruling and ordered Fishburne to produce the entire diary to the referee and ordered that the referee "redact all comments, notes, etc. which do not relate to [Fishburne's] therapy, to [Fishburne's] thoughts, feelings and/or other matters not concerning [Fishburne's] entry regarding when he was advised that he had been informed he had received a role in the subject motion picture." The Superior Court made this ruling in spite of Fishburne's plea for constitutional protection. (App. 16-17). Petitioners timely sought reconsideration or, alternatively, clarification of this order from the Superior Court. The Superior Court granted Petitioners' motion for clarification and made clear that Petitioners were indeed required to produce the entire psychotherapy diary to the discovery referee. The order, as clarified, required the discovery referee to review the diary

in camera and to redact all materials not pertaining to Fishburne's knowledge that he had obtained the role in the Movie. (App. 18-20).

The California Appellate Courts' Summary Denials Of Petition For Writ Of Mandate And Petition For Supreme Court Review

On September 28, 1995, Petitioners filed a petition for an emergency stay and for a writ of mandate with the California Court of Appeal, Second Appellate District, to reverse the Superior Court's order compelling production of Fishburne's psychotherapy diary. This Petition included Petitioners' argument that the diary is protected by Fishburne's right to privacy provided under the California and United States Constitutions. The Court of Appeal issued a temporary stay on October 3, 1995. (App. 34-35). The Court of Appeal then summarily denied the petition by order dated November 1, 1995. (App. 36-37).

On November 6, 1995, Petitioners then filed a Petition for an emergency stay and review with the Supreme Court of California to reverse the Superior Court's Order. The Supreme Court of California summarily denied the Petition by Order dated November 15, 1995, with three Justices dissenting. Petitioners attempted to file a Motion for Reconsideration with the Supreme Court of California but that motion was summarily rejected by the clerk, who refused to accept the filing. This Petition followed.

REASONS FOR GRANTING THE PETITION

I
THE CIRCUITS ARE SPLIT REGARDING BOTH THE RECOGNITION OF AND BASES FOR A PSYCHOTHERAPIST-PATIENT PRIVILEGE

This case raises important and recurring questions involving the existence and scope of constitutional protection for confidential, intensely personal information developed in the course of a psychotherapist-patient relationship. Rule 501 of the Federal Rules of Evidence provides that courts interpret principles of common law "in the light of reason and experience" when considering questions of privilege. Congress enacted this provision, rather than a number of specific privileges, in order to avoid freezing the law of privilege into a state that our country might outgrow. *Trammel v. United States*, 445 U.S. 40, 47 (1980). Unfortunately, issues about the "reason and experience" pertaining to privileges general, and the psychotherapist-patient privilege in particular, are in conflict among the circuits.

Indeed, the circuit courts disagree whether Federal Rule of Evidence 501 provides a federal psychotherapist-patient privilege. The Courts of Appeals for the Fourth, Fifth, Tenth, and Eleventh Circuits have rejected the psychotherapist-patient privilege in its entirety. *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992); *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1989). The Ninth Circuit acknowledges a qualified privilege, but does not extend it to the protection of evidence from grand jury review. *In Re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989); *see Caesar v. Mountanos*, 542 F.2d 1064, 1067 n. 9 (9th

Cir. 1976) (recognizing constitutional underpinnings of psychotherapist-patient privilege), *cert. denied*, 430 U.S. 589. The Second, Sixth, and Seventh Circuits have acknowledged a qualified psychotherapist-patient privilege in both civil and criminal cases. *Jaffee v. Redmond*, 51 F.3d 1346, 1356 (7th Cir. 1995), *cert. granted*, 116 S.Ct. 334 (Oct. 16, 1995) (No. 95-266); *In Re Doe*, 964 F.2d 1325 (2nd Cir. 1992); *In Re Zuniga*, 714 F.2d 632 (6th Cir. 1983).

Assuming there is a psychotherapist-patient privilege under Rule 501, there is further confusion among the circuits as to whether it has constitutional underpinnings. *See Jaffee, 51 F.3d at 1346; Doe, 964 F.2d at 1328; Zuniga, 714 F.2d at 639.* Many of the cases discuss the "reason and experience" standard of Rule 501, but this standard serves as a giant mixing bowl for two different rationales. *Jaffee, 51 F.3d 1346; Doe, 964 F.2d at 1328; Zuniga, 714 F.2d at 639.* Along with or instead of the constitutional argument for a psychotherapist-patient privilege, courts often discuss the "benefit to society." *Jaffee, 51 F.3d 1346; Doe, 964 F.2d at 1328; Zuniga, 714 F.2d at 639.*

As a result of this jumble of cases, litigants are faced with some courts which recognize a constitutional basis for the privilege, some which do not, and many which recognize the possibility of constitutional protection but do not express an opinion. For instance, the Sixth Circuit in *Zuniga* decided the issue by assuming, arguendo, that there is a constitutional right to privacy creating a psychotherapist-patient privilege. *Zuniga*, 714 F.2d at 641. In recognizing the psychotherapist-patient privilege, the Second Circuit cited *Zuniga* and discussed privacy interests but never mentioned the constitution. *Doe*, 964 F.2d at 1328. The Seventh Circuit discussed how the constitutional right of privacy should protect psychotherapeutic information but did not base its recognition of the privilege under Rule 501 expressly on

the constitutional right of privacy. *Jaffee*, 51 F.3d at 1356. The Ninth Circuit alone has made a full acknowledgement of the constitutional protection of information derived from psychotherapy. *Grand Jury Proceedings*, 867 F.2d at 565; *Caesar*, 542 F.2d at 1067.

II
WHETHER THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IS BASED UPON THE CONSTITUTIONAL RIGHT TO PRIVACY IS AN IMPORTANT ISSUE.

Judging by this Court's grant of the Petition for Writ of Certiorari in *Jaffee*, the existence of a federal psychotherapist-patient privilege is an important issue. *Jaffee v. Redmond*, 116 S. Ct. 334 (U.S. Oct. 16, 1995) (No. 95-266). The basis for this privilege is just as important. A privilege based solely on "utility to society" would apply only in federal question cases in federal courts. Conversely, a privilege based, at least in part, on the constitutional right to privacy must be applied in all actions, both state and federal. Fed. R. Evid. 501; *See Harper v. Virginia Dept. of Taxation*, — U.S. —, 113 S.Ct. 2510, 2520 (1993) (states are free to fashion their own protections and forms of relief so long as those measures satisfy the minimum federal constitutional requirements). Thus, a constitutionally based psychotherapist-patient privilege would result in a mandatory minimum level of protection afforded to private psychotherapeutic information of all persons.

In addition, even in federal question cases, a federal constitutionally based psychotherapist-patient privilege would result in a different standard of protection than would a privilege based only on a "benefit to society" theory. The various federal circuits disagree as to the level of scrutiny required to uphold state actions that infringe on

an individual's constitutional right to prevent the disclosure of private information. *Barry v. City of New York*, 712 F.2d 1554, 1559 (2nd Cir. 1983). Should this Court grant this Petition and find a constitutional basis for the psychotherapist-patient privilege, the Court could then clarify this area of the law as well.

At the very least, if the psychotherapist-patient privilege is based on the constitutional right of privacy, state compelled disclosure of privileged information would have to satisfy a balancing test between the individual privacy interests at issue and the legitimate state interest served by the disclosure. *Barry*, 712 F.2d at 1559 (citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977)). Under other circuits' interpretations of the law, if the psychotherapist-patient privilege has constitutional roots, compelled disclosure of privileged information might have to satisfy intermediate, or even strict scrutiny. *Barry*, 712 F.2d at 1559; *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986).

If, however, the psychotherapist-patient privilege has no constitutional roots, then the standard of protection could be judged based upon societal interests rather than by an interest in individual protection of individual rights. *See Jaffee*, 51 F.3d at 1357 (balancing both the individual's privacy interests and society's interest in encouraging psychotherapy against the evidentiary need for the protected information); *Zuniga*, 714 F.2d at 640 (balancing society's interest against the evidentiary need for the protected information). Therefore, a constitutionally based psychotherapist-patient privilege would mandate court analysis of the effects of disclosure of confidential information on an individual's privacy interests.

The differences between recognizing a psychotherapist-patient privilege based on the constitution,

contrasted with a privilege based on "societal benefit," will have sweeping effects on the American people and their privacy. As courts have uniformly recognized, the practice of psychotherapy has grown and continues to grow at a rapid rate. *In Re Lifschutz*, 2 Cal.3d 415, 421 (1970). Moreover, "there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment." *Zuniga*, 714 F.2d at 638 (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960) (*see also* in Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1973)). "The psychiatric patient confides more utterly than anyone else in the world. . . . [H]e lays bare his entire self, his dreams, his fantasies, his sins, and his shame." *Zuniga*, 714 F.2d at 638 (quoting *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955). Thus, the psychotherapeutic relationship inevitably generates confidential information, it is equally inevitable that opposing litigants will frequently try to discover such private, confidential information as relevant to a suit, or simply to harass the patient. Since the patient will usually oppose these discovery attempts on privilege grounds, the two variants of the privilege discussed herein would result in vastly different legal landscapes.

III
THIS CASE WAS ERRONEOUSLY DECIDED

The Superior Court's failure even to address Fishburne's timely raised constitutional right to avoid disclosure, and the resulting order of disclosure of Fishburne's *entire* diary, conflicts with federal court precedent and unjustly invades Fishburne's privacy interests. The constitution gives individuals the right to avoid disclosure of such intensely personal matters. *Nixon*, 433 U.S. at 458 (citing *Whalen v. Roe*, 429 U.S. 589, 600 (1977)). As stated by the Sixth Circuit in *Zuniga*, the

rationale to support a psychotherapist-patient privilege based on this constitutional right is "readily apparent." *Zuniga*, 714 F.2d at 638.

Fishburne wrote his diary at the direction of his psychotherapist and has shown it to no one except his psychotherapist. The diary contains Fishburne's most personal and private thoughts, feelings and beliefs on all manner of topics. Under *Whalen* and *Nixon*, a judicially compelled disclosure of this diary will substantially infringe Fishburne's constitutionally protected privacy interests.

Further, the Superior Court's order could not satisfy even the lowest possible standard applicable to a constitutionally protected right. The Superior Court never balanced any interests before making its order. Indeed, the record reveals that the Superior Court ordered disclosure merely because Petitioners have sued Defendants for "a big chunk of money." (App. at 28). In short, the Superior Court failed to tailor its invasion of Fishburne's privacy interest to narrowly fit the government interest being served. Even under the least stringent requirements for a state action infringing on the fundamental right of privacy, the order must be substantially related to the government interest. *Barry*, 712 F.2d at 1559. Here, the only government interest is the disclosure of information relevant to a trial on the merits. The Superior Court recognized that "98 or 99 percent" of the diary cannot possibly be relevant. (App. at 27). The order requiring disclosure of the entire diary is therefore unconstitutionally overbroad.

IV
CONCLUSION

The various circuits of the United States Court of Appeals disagree dramatically on the important question of whether the constitution protects a confidential diary,

created as part of a psychotherapist-patient relationship, from state-compelled disclosure. The circuits further disagree to what extent such compelled disclosure can take place in light of substantial constitutional rights of privacy at issue. Petitioners respectfully request that this Court grant this petition to resolve these conflicts within different circuits of the United States Court of Appeals.

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LAURENCE FISHBURNE, an individual, and THE LOA PRODUCTIONS, INC., a New York corporation,	) CASE NO. SC 031 787)) REPORT AND RECOMMENDATION RE DISCOVERY DISPUTE AS TO DIARY ENTRY WITHHELD FROM PRODUCTION ON THE BASIS OF PSYCHOTHERAPIST-PATIENT PRIVILEGE
Plaintiffs,	
vs.	
CINERGI PRODUCTIONS, INC., a California corporation,	

[CONTINUED ON NEXT PAGE]	)	
CINERGI PICTURES ENTERTAINMENT, INC., a Delaware corporation, ANDREW G. VAJNA, an individual, RANDOLPH M. PAUL, an individual, and DOE 1 through DOE 100, inclusive,	)	Discovery Cut-Off: 12/29/95 Motion Cut-Off: 1/15/96 Trial Date: 1/30/96
Defendants.	)	
AND RELATED CROSS-COMPLAINT.	)	

Pursuant to the Orders of the Reference in the above matter issued by the Honorable Alan B. Haber on December 12, 1994 and by the Honorable Hugh Gardner on June 28, 1995, the undersigned, sitting as Discovery Referee, conducted a hearing on July 11, 1995, with respect to a pending discovery dispute. Oberstein, Doniger, Fetter, Kibre & Horwitz, by Howard L. Horwitz, Esq., appeared as counsel of record for defendants Cinergi Pictures Entertainment Inc. and Andrew G. Vajna and defendant and cross-complainant Randolph M. Paul (collectively "defendants"). Christensen, White, Miller, Fink & Jacobs, by Melvin N.A. Avanzado, Esq., appeared as counsel of

record for plaintiffs Laurence Fishburne and The LOA Productions, Inc. (collectively "plaintiffs"). There were no other appearances. The following Report and Recommendation is hereby issued.

On November 4, 1994, defendants filed their Motion to Compel Further Response to Demand for Inspection and Photocopying of Documents by Plaintiffs ("defendants' motion"), which was referred by the Court to the undersigned as Discovery Referee under C.C.P. § 639. Defendants' motion sought, inter alia, production of a diary entry made by plaintiff Laurence Fishburne ("Mr. Fishburne") concerning his feelings upon first learning that he had gotten the part of "Zeus" in the motion picture "Die Hard III". Plaintiffs' counsel had agreed on the record during Mr. Fishburne's deposition to produce the diary entry, which had been within the ambit of a notice to produce documents at Mr. Fishburne's deposition under C.C.P. § 2025(h)(1). The diary entry was also within the scope of a document demand served by defendants under C.C.P. § 2031. Defendants' motion contended that notwithstanding the foregoing, plaintiffs had failed and refused to produce the diary entry.

A hearing was held on the issue, and numerous others, on January 16, 1995, at which time plaintiffs asserted that the diary entry was protected from disclosure by the psychotherapist-patient privilege. Defendants argued that any such privilege had not been timely asserted because it was not set forth in plaintiffs' response to the document demand and further, had been waived when plaintiffs' counsel agreed at the deposition to produce entry. Subsequent hearings on the issue, and others, were also held.

It is the Discovery Referee's determination that the privilege, if applicable, was not waived either by counsel's agreement at the deposition to produce the diary entry or plaintiffs' failure to assert the privilege prior to the January 16, 1995, hearing. However, it was also determined that a further factual showing would have to be made by plaintiffs in support of their assertion of the applicability of the privilege. Plaintiffs were thus directed to submit a declaration signed by Mr. Fishburne setting forth sufficient facts to establish that the diary entry was protected from disclosure by the privilege. Plaintiffs were directed to prepare and submit a declaration signed by Mr. Fishburne establishing that the diary was (a) started and maintained at the instruction of his therapist, (b) maintained in confidence and not shown to anyone other than his therapist, and (c) initiated and maintained to facilitate communications and in furtherance of his counseling sessions. Such a declaration was later submitted, a copy of which is attached hereto as Exhibit "A".

On July 11, 1995, a hearing was then held as to the sufficiency of the declaration and the applicability of the privilege. Defendants contended that the declaration was insufficient because it failed to identify the therapist and it thus could not be concluded that the therapist met the definition of "psychotherapist" set forth in California Evidence Code § 1010. Defendants also contended that the specific diary entry at issue was not privileged because the declaration indicated the entry had never been shown to the therapist such that it was not a transmitted communication between Mr. Fishburne and his therapist within the meaning of California Evidence Code § 1012. Plaintiffs contended that the psychotherapist-patient privilege applied whether or

not particular diary entries were shown to the therapist as long as the diary was initiated and maintained at the direction of the psychotherapist, in furtherance of Mr. Fishburne's treatment, reflected communications between patient and psychotherapist and maintained in a confidential manner.

It is the Discovery Referee's determination that the declaration is sufficient to invoke the privilege, and that the diary entry is privileged, if by August 30, 1995, plaintiffs' counsel writes and delivers to defendants' counsel a letter which (1) identifies the qualifications of Mr. Fishburne's therapist sufficiently to establish that the therapist is a psychotherapist within the definition set forth in California Evidence Code § 1010, and (2) irrevocably waives any claim by plaintiffs that they sustained emotional distress as a consequence of the alleged conduct of defendants other than the "normal" distress, if any, that typically flows from intentional fraud. Defendants' contention that the name of the therapist (which to date has not been disclosed) must be provided is also rejected. The Discovery Referee finds that the specific diary entry need not have been transmitted or shown to the therapist to be privileged; it is sufficient if the therapist instructed Mr. Fishburne to keep a diary, if the diary was maintained by Mr. Fishburne to record his personal thoughts and feelings and to facilitate the therapy, and if Mr. Fishburne has never shown any portion of his diary to any person other than his therapist.

The Discovery Referee has been advised that it is the intention of defendants to object to this Report and Recommendation.

DATED: _____ _____

LEONARD S. WOLF

AGREED AS TO FORM:

CHRISTENSEN, WHITE, MILLER, FINK, JACOBS, GLASER & SHAPIRO, LLP

BY: _____

Melvin N. A. Avanzado

Attorneys for plaintiffs

OBERSTEIN, DONIGER, FETTER, KIBRE & HORWITZ

BY: _____

Howard L. Horwitz

Attorneys for defendants

ORDER

The Court having considered the file and the above Report and Recommendation, hereby adopts the findings, recommendation and orders herein as the Order of this Court.

DATED: _____

Judge, Superior Court

DECLARATION OF LAURENCE J. FISHBURNE

I, Laurence J. Fishburne, declare as follows:

1. I am the Plaintiff in this action pending in Los Angeles County Superior Court, entitled Fishburne, et al. v. Cinergi Productions, Inc., et al., Case No. SC 031 787. Consequently, I have personal knowledge of the facts contained in this declaration and, if called, could and would testify to these facts under oath. I submit this declaration pursuant to the Order of the Honorable Leonard S. Wolf, Judge of the Superior Court (Retired), who was appointed as the discovery referee in this action.

2. In 1992, my therapist instructed me to maintain a diary containing my personal thoughts and feelings. This diary was supposed to facilitate my communications with my therapist during our counseling sessions. According to my therapist, my maintenance of a diary would help me communicate any personal issues I encountered outside of our counseling sessions. In addition, my diary was also supposed to help me understand and deal with personal issues by committing them to writing. It is my understanding that my diary is part and parcel of my counseling with my therapist.

3. Other than my therapist, I have never shown any portions of my diary to any other person, including my lawyers.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 26th day of May, 1995 at Los Angeles, California.

_____

Laurence J. Fishburne

PROOF OF SERVICE
(C.C.P. §1013a(3)

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is 1999 Avenue of the Stars, Suite 1850, Los Angeles, California, 90067.

On August 2, 1995, I served the following document described as REPORT AND RECOMMENDATION RE DISCOVERY DISPUTE AS TO DIARY ENTRY WITHHELD FROM PRODUCTION ON THE BASIS OF PSYCHOTHERAPIST-PATIENT PRIVILEGE on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE SERVICE LIST

(X) AS FOLLOWS: I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the united States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Los Angeles, California.

(X) Executed on August 2, 1995 at Los Angeles, California.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

_____

AMBER HIGGINS

Service List

Fishburne v. Cinergi
Case No. SC 031 787

Andrew M. White, Esq.
Melvin N.A. Avanzado, Esq.
Christensen, White, Miller, Fink, Jacobs, Glaser & Shapiro, LLP
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Bonnie E. Eskenazi, Esq.
Greenberg, Glusker, Fields,
Claman & Machtinger
1900 Avenue of the Stars, Ste. 2000
Los Angeles, CA 90067

The Honorable Leonard S. Wolf
Judge Retired
413 Howland Canal
Venice, CA 90291

Leonard S. Wolf, Judge (Retired)
413 Howland Canal
Venice, California 90291
(310) 822-3600

Discovery Referee

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LAURENCE FISHBURNE, an individual, and THE LOA PRODUCTIONS, INC., a New York corporation, Plaintiffs, vs. CINERGI PRODUCTIONS, INC., a California corporation, CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation, [CONTINUED ON NEXT PAGE]	CASE NO. SC 031 787 SUPPLEMENTAL REPORT AND RECOMMENDATION RE DISCOVERY DISPUTE AS TO DIARY ENTRY WITHHELD FROM PRODUCTION ON THE BASIS OF PSYCHOTHERAPIST-PATIENT PRIVILEGE

ANDREW G. VAJNA, an individual,	)	
RANDOLPH M. PAUL, an individual, and DOE 1 through DOE 100, inclusive,	)	Discovery Cut-Off 12/29/95 Motion Cut-Off: 1/15/96 Trial Date: 1/30/96
Defendants.	)	
AND RELATED CROSS-COMPLAINT.	)	

This Supplemental Report And Recommendation is submitted on the issue of the discoverability of a diary entry made by plaintiff Laurence Fishburne. A Report And Recommendation (Exhibit "A") was previously submitted on this issue. I have read defendants' Objection and plaintiffs' Response, copies of which are attached hereto as Exhibits "B" and "C," respectively. Plaintiffs' Response gives the impression that during the proceedings before me, sitting as Discovery Referee, the issue of whether the diary entry at issue was protected from disclosure by a constitutional right of privacy was decided by me. Although plaintiffs raised the constitutional right of privacy issue in their papers, I did not base my decision on the constitutional right of privacy. I deemed the constitutional issue to be moot because of my ruling that the diary was protected by the statutory psychotherapist-patient privilege. I did not reach the broader

issue of whether the diary was also protected, or otherwise protected, by the constitutional right of privacy. The sole issue decided by me was whether the diary entry was protected from disclosure by the statutory patient-psychotherapist privilege. Should the Court conclude that the statutory privilege does not protect the diary entry from production for the reason articulated by defendants in their Objection, it is recommended that all issues regarding the discoverability of the diary entry be referred to me for further proceedings consistent with the Court's determination.

Dated: August ___, 1995

_____

Leonard S. Wolf
Discovery Referee

COUNTY OF LOS ANGELES
SUPERIOR COURT OF CALIFORNIA

Date: August 10, 1995	L. HERNANDEZ
HONORABLE	Deputy Clerk
ALAN B. HABER JUDGE	Electronic Recording
HONORABLE	Monitor
JUDGE PRO TEM	Reporter
J. JIMENEZDeputy Sheriff	(Parties and counsel check
Court Attendant	if present)
	NONE

SC031787	Counsel for
LAURENCE FISHBURNE-ETC-ET AL	Plaintiff
vs	NO APPEARANCES
CINERGI PRODUCTIONS, INC-ETC-	Counsel for
ET AL	Defendant

NATURE OF PROCEEDINGS:

DISCOVERY REFEREE'S REPORT & RECOMMENDATIONS RE: DISCOVERY DISPUTE AS TO DIARY ENTRY WITHHELD FROM PRODUCTION ON THE BASIS OF PSYCHOTHERAPIST-PATIENT PRIVILEGE:

The Court has read and considered the Report and Recommendations of retire Judge Leonard Wolf, and accepts, in part, and rejects in part, the recommendations of Judge Wolf, the discovery referee.

To the extent that the subject diary contains an entry which defendant seeks, the Discovery Referee shall isolate said entry, copy said entry; redact all comments, notes etc. which do not relate to plaintiff's therapy, to plaintiff's thoughts, feelings and/or other matters not concerning plaintiff's entry regarding when he was advised that he had been informed he received a role in the subject motion picture.

A copy of this minute order is sent via U.S. Mail as follows:

NORMAN S. OBERSTEIN
HOWARD L. HORWITZ
OBERSTEIN-DONIGER-FETTER
1999 Avenue of the Stars, Suite 1850
Los Angeles, California 90067-6050

ANDREW M. WHITE
MELVIN N.A. AVANZADO
CHRISTENSEN, WHITE, MILLER, FINK, JACOBS, GLASER & SHAPIRO, LLP
2121 Avenue of the Stars, 18th Floor
Los Angeles, California 90067

BONNIE E. ESKENAZI
GREENBERG-GLUSKER-FIELDS
1900 Avenue of the Stars, Suite 2000
Los Angeles, California 90067

JUDGE LEONARD S. WOLF
413 HOWLAND CANAL

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES DEPT.

Date: September 14, 1995 HONORABLE ALAN B. HABER JUDGE HONORABLE JUDGE PRO TEM J. JIMENEZ Deputy Sheriff	L. HERNANDEZ Deputy Clerk_____ _____ Electronic Recording Monitor T. BOLLINGER Reporter (Parties and counsel check if present)

SC031787 FISHBURNE, LAURENCE-ET AL	Counsel for Plaintiff
CINERGI PROD INC-ET AL	Counsel for Defendant

NATURE OF PROCEEDINGS:
DISCOVERY REFEREE TO REDACT EVERYTHING EXCEPT NOTICE OF FISHBURNE TO GET MOVIE ROLE PRODUCTION TO BE WITHIN 20 DAYS

PLTF (LAURENCE FISHBURNE - ET AL)

MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR CLARIFICATION OF ORDER ACCEPTING IN PART AND REJECT IN PART REPORT AND RECOMMENDATION OF DISCOVERY REFEREE;

☐ It is stipulated (not stipulated) that Commissioner _____ may hear of the matter as Judge Pro Tem (by moving party/responding party).

☐ TRANSFERRED TO/FROM DEPARTMENT _____ ☐ Court disqualifies itself ☐ 170.6 CCP affidavit filed

☐ OFF CALENDAR On court's own motion ☐ No Appearances ☐ At request of moving party ☐ By stipulation

☐ CONTINUED TO _____ IN DEPT. _____ AT _____ AM/PM

☐ On court's own motion ☐ Stip. to be filed ☐ On oral/written stipulation ☐ OSC Discharged

☐ REQUEST OF ☐ Moving party ☐ Respondent(s) ☐ Per Ex Parte Order of _____

☐ TRO to remain in full force and effect ☐ TRO _____

☐ MOTION: ☐ granted as prayed ☐ denied ☐ with/without prejudice ☐ argued and taken under submission ☐ DEMURRER: ☐ sustained/☐ overruled ☐ with/without leave to amend ☐ _____ days to _____/_____

☐ JUDGMENT ☐ ORDER TO BE PREPARED BY ☐ Moving party ☐ Responding party ☐ Clerk

☐ NOTICE: ☐ Waived ☐ by moving party ☐ by respondent(s) _____

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED) ☐ ORDER/JUDGMENT IS SIGNED AND FILED.

Dept.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B JUDGE ALAN B. HABER

LAURENCE FISHBURNE, et al., Plaintiff, v. CINERGI PROD. INC., et al., Defendants	Case No. SC 031 787

TRANSCRIPT OF PROCEEDINGS

September 14, 1995

APPEARANCES:

For the Plaintiffs: MELVIN N.A. AVANZADO, ESQUIRE
Christensen, White, Miller, Fink, Jacobs, Glaser, & Shapiro, LLP
2121 Avenue of the Stars, 18th Floor
Los Angeles, California 90067
(310) 553-3000

For the Defendants: HOWARD HORWITZ, ESQUIRE
Oberstein, Doniger, Fetter, Kibre & Horwitz
1999 Avenue of the Stars, Suite 1850
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(310) 557-1213

Courtroom Recorder: T. Bollinger

Transcription Company: Briggs Reporting Company, Inc.
8000 Kenyon Avenue
Los Angeles, California 90045
(310) 410-4151

ORIGINAL

LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 14, 1995

DEPARTMENT WE B JUDGE ALAN B. HABER

APPEARANCES:

Counsel for the Plaintiffs, MELVIN AVANZADO, Esq.;
Counsel for the Defendants, HOWARD HORWITZ, Esq.

MR. HORWITZ: Good afternoon, your Honor; Howard Horwitz for Defendants.

MR. AVANZADO: Good afternoon, your Honor; Mel Avanzado of Christensen, White, Miller, Fink & Jacobs for Plaintiffs and moving parties.

THE COURT: It wasn't until after I prepared the tentative and somehow this case stuck in my mind. I kept coming back to it. I did take a look at the minute order a second time. I thought I looked at it after I received your moving papers and --

MR. AVANZADO:I apologize for not attaching them.

THE COURT: No, no, I now see what the -- what I think the problem is. I think that the minute order is ambiguous and makes very little sense whatsoever. My intention was to require the discovery referee to redact everything except the -- what I consider to be material on the question that you were interested in, having to do with what notice that Mr. Fishburne had with respect to -- was it the cancellation?

MR. HORWITZ: Whether he got the part.

THE COURT: Whether he got the part. In other words, everything else. So, to the extent that you complain that the Court didn't concern yourself -- itself with your

client's privacy rights, it was not -- I think it was not made clear in the tentative ruling that I felt that I had. I don't want any information with respect to your client's private thoughts, his dealings with a therapist to be revealed to the moving party.

MR. AVANZADO: There was an inadvertent not --

THE COURT: Yeah, that's exactly the problem. And --

MR. HORWITZ: Your Honor --

THE COURT: -- I apologize to that. I -- you know, it's hard for me to actually review the minute orders, but I'm still responsible. I drafted the material that went into the minute order and it was my mistake, and I did create the problem. But I -- is that what you're concerned about?

MR. AVANZADO: It is at the third level, but I believe that your problem is that we think any requirement to produce -- even the one or two entries pertaining in the picture, violates the privacy right, and we believe --

THE COURT: And you indicated that. But your position essentially is that so much as allowing -- or my ordering the discovery referee to review the diary constitutes an improper invasion of your client's constitutional right to privacy. That's your problem, right?

MR. AVANZADO: And that 915 does not authorize it.

THE COURT: Okay.

MR. AVANZADO: Our review is that they've already asked the question at deposition, "When were you informed?" and he gave his best testimony. If they want to ask it in interrogatory form and we can review the diary to get the date which is what they're looking for, apparently, then maybe we can answer it that way. That would be more narrowly tailored relief than to require physical production of any portion of this diary --

THE COURT: Not ordering, the diary produced; that's where you -- I think there's a mistake in assumption. My intention -- and if it's not clear from the minute order, you're going to see a new minute order. That -- the discovery referee shall only provide what I understand to be one entry with respect to the items sought by the moving party.

MR. AVANZADO: Understood. But our position is that the production to the --

THE COURT: No, I understand you and I reject that argument.

MR. AVANZADO: Okay.

MR. HORWITZ: Your Honor, I would like to be heard as to the one entry issue. I'm at a disadvantage here, your Honor, because there has never been an identification by the Plaintiffs of the references in the diary that pertain to this

motion picture or to the other picture that's at issue, because there's a mitigation issue. In deposition, the Plaintiff testified that maybe it was one or two entries. He wasn't really sure.

THE COURT: Well, the order has certainly brought enough to encompass more than one entry. I --

MR. HORWITZ: As long as that's understood, I have confidence the judge will restrict the production --

THE COURT: I have no doubt that he will once he receives a clear and unambiguous order.

MR. AVANZADO: And, your Honor, just so that we're clear, your order would compel us to produce to the discovery referee only the relevant --

THE COURT: Yes, only the relevant --

MR. AVANZADO: -portions --

THE COURT: No.

MR. AVANZADO: -relating to the movie. Not the whole diary so that he can redact all the other entries as except the two entries relating to the movie.

THE COURT: You're to take that diary to the discovery referee and point out all entries that pertain to the sought-after material.

MR. AVANZADO:Okay.

THE COURT: Once the discovery referee -- if the discovery referee finds those matters and makes a decision that -- the information the moving party is seeking, it doesn't make any difference -- it would seem like an exercise in futility and a waste of everyone's time to have the referee redact the entire rest of the diary.

MR. AVANZADO:Well, my --

THE COURT: Which is probably 98 or 99 percent of the material.

MR. AVANZADO:That's correct. And our --

THE COURT: He can make -- that referee can make copies of the relevant material, period. So, I guess redaction is really not an issue.

MR. AVANZADO:Our question is: What do we have to show the referee? Do we have to show him the entirety of the diary so that he can isolate the entry, or can we just show him the entries and us isolate the entries?

THE COURT: You let the referee to make that decision. Look. We're talking about a third party who's independent, who's not going to disclose any of the information.

MR. AVANZADO:We understand. But, your Honor, just so that I can make my record, because I think this is

important to our client, we have not seen this diary, because we believe that our review of the lawyer's review also infringes upon his psychotherapist/patient privilege and his right of privacy.
Now, our view is that any disclosure to anyone outside of him and his therapist violates his right, and your Honor is disagreeing with us.

THE COURT: Well, I most certainly am disagreeing with you. Let's not lose sight of the fact that your client -- and he certainly has a right to do it as the Plaintiff in this litigation -- he's seeking a big chunk of money from the Defendant had there is a material issue as to whether or not he was told whether or not he had the role in this motion picture or the motion pictures.

MR. HORWITZ: Correct, your Honor.

MR. AVANZADO: And that has been given over in terms of the -- we've even given the lawyers notes on when he was told, et cetera. That discovery has been -- we're not trying to preclude the discovery, we're trying -- we're limiting our argument solely on this -- which I think it's uncontradicted in the record -- was created and maintained solely at the direction of his therapist. And a licensed psychotherapist under the State of California -- we believe that is covered by the psychotherapist relationship.

THE COURT: I understand. All right, you should have something resembling equal time so that there's a proper record for the Appellate Court. Do you wish to be heard?

MR. HORWITZ: Well, your Honor, I do think the papers cover it. I would like to note that I don't think Evidence Code Section 915(a) that they've cited really pertains. That only applies to an in-camera inspection to determine whether the privilege applies. That's not the purpose of the in-camera inspection that's ordered by the court. And, also, I think the Court has indicated that the referee's examination is not limited to one entry. It may be only one entry, but it -- we've sought more than that.

THE COURT: Well, the way I'd ask you to approach it is, unless you feel that your act of opening the diary somehow constitutes a waiver of your claim that there's been an invasion of your client's privacy rights, you're certainly free to point out if there is such an entry or entries to the discovery referee and let the discovery referee make a determination. I know -- I can't imagine that the referee has any interest in wasting any of his time in going through a complete diary --

MR. HORWITZ: We understand.

THE COURT: - that has no material relationship to any of the issues in this case other than the one or two entries.

MR. HORWITZ: Your Honor, I would request that the -- I assume there's going to be a new minute order?

THE COURT: Yes.

MR. HORWITZ: Is that the Court's preference.

THE COURT: Yes. Brand new.

MR. HORWITZ: Will the Court please, in its minute order, set a deadline for the --

THE COURT: How much time do you need?

MR. HORWITZ: -compliance?

MR. AVANZADO: Your Honor --

THE COURT: I won't stay the order but I'll give you enough time if you want to seek appellate relief. Twenty days?

MR. AVANZADO: Twenty days is fine.

THE COURT: All right, that's fair.

MR. AVANZADO: We -- I think we are going --

THE COURT: You're not -- you be my guest.

MR. AVANZADO: But you will not stay the order if I requested your Honor to stay the order --

THE COURT: I'm giving you 20 days to comply. that's enough time.

MR. AVANZADO: Yeah. thank you, your Honor.

THE COURT: All right.

MR. HORWITZ: That should be sufficient, your Honor.

THE COURT: All right, notice is waived?

MR. HORWITZ: I'll give notice. There's a non-party here -- not here.

THE COURT: Thank you.

MR. HORWITZ: Or a party who is not here.

(Proceedings in the above-entitled matter were concluded.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B JUDGE ALAN B. HABER

LAURENCE FISHBURNE, et al., Plaintiff, v. CINERGI PROD. INC., et al., Defendants.	Case No. SC 031 787

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, HORACE W. BRIGGS, a duly designated transcribe, do hereby declare and certify under penalty of perjury that I have caused to be transcribed the portion of tape 1, which

was duly recorded in the Superior Court of the State of California, County of Los Angeles, Department WE B, on the 14th day of September, 1995, in the above-mentioned case, and that the foregoing 9 pages compromise a true and correct, accurate transcription of the aforementioned tape.

Dated this 22nd day of September, 1995.

_____

Transcriber

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LAURENCE FISHBURNE, and THE LOA PRODUCTIONS, INC., a NEW YORK corporation,	)	B096113
	)	(Super. Ct. No. SC031787; Alan B. Haber, Judge)
Petitioners,	)	STAY ORDER
v.	)	
SUPERIOR COURT OF LOS ANGELES COUNTY,	)	
Respondent;	)	
CINERGI PRODUCTIONS, INC. ET AL.	)	
Real Parties in Interest	)	

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA:

So that this court may have an opportunity to consider the petition for writ of mandate filed September 28, 1995, the superior court's order of September 14, 1995, clarifying its order of August 10, 1995, compelling petitioner to produce his diary, is stayed pending disposition of this petition.

_____

BOREN, P.J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LAURENCE FISHBURNE, and THE LOA PRODUCTIONS, INC., a NEW YORK corporation,	)	B096113
	)	(Super. Ct. No. SC031787; Alan B. Haber, Judge)
Petitioners,	)	
	)	STAY ORDER
v.	)	
SUPERIOR COURT OF LOS ANGELES COUNTY,	)	
Respondent;	)	
CINERGI PRODUCTIONS, INC. ET AL.	)	
Real Parties in Interest	)	

THE COURT:*

The petition for writ of mandate filed on September 28, 1995 has been read and considered. The petition is denied. The stay issued on October 3, 1995 is vacated.

---

*FUKUTO, Act. P.J. NOTT, J. ZEBROWSKI, J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 11/01/95

Christensen, White, Miller, Fink, Jacobs,
Glaser & Shapiro, LLP
David E. Fink
2121 Avenue of the Stars
18th Floor
Los Angeles, California 90067

RE: Fishburne, Laurence
vs.
S.c.l.a.
Cinergi Productions Inc
2 Civil B096113
Los Angeles NO. SC031787

App. 39

No. 2/2 B096113 - S049930

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

LAURENCE FISHBURNE, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent,

CINERGI PRODUCTIONS, INC. et al.,
Real Parties in Interest

Application for stay and petition for review DENIED.

Mosk, J., George, J. and Werdegar, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

No. _____

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC., a New York corporation,

Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
(The Honorable Alan B. Haber)
Case No. SC 031 787,

Respondent.

CINERGI PRODUCTIONS, INC., a California corporation,
CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation,
ANDREW G. VAJNA and RANDOLPH M. PAUL,

Defendants and Real Parties In Interest.

PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF SUPERSEDEAS, MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES REGARDING DISCOVERY ORDER IN VIOLATION OF PETITIONERS' PSYCHOTHERAPIST-PATIENT PRIVILEGE AND CONSTITUTIONAL RIGHT OF PRIVACY

EMERGENCY AND IMMEDIATE STAY REQUESTED PENDING

CHRISTENSEN, WHITE, MILLER, FINK, JACOBS, GLASER & SHAPIRO, LLP
Andrew M. White (State Bar No. 60181)
Melvin N.A. Avanzado (State Bar No. 137127)
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2121 Avenue of the Stars
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Los Angeles, California 90067
(310) 553-3000

Attorneys for Plaintiffs and Petitioners LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC.

No. _____

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

LAURENCE FISHBURNE and
THE LOA PRODUCTIONS, INC., a New York corporation,

Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
(The Honorable Alan B. Haber)
Case No. SC 031 787,

Respondent.

CINERGI PRODUCTIONS, INC., a California corporation,
CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation,
ANDREW G. VAJNA and RANDOLPH M. PAUL,
Defendants and Real Parties In Interest.

PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF SUPERSEDEAS, MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES REGARDING DISCOVERY ORDER IN VIOLATION OF PETITIONERS' PSYCHOTHERAPIST-PATIENT PRIVILEGE AND CONSTITUTIONAL RIGHT OF PRIVACY

INTRODUCTION

Petitioners Laurence Fishburne ("Fishburne") and The LOA Productions, Inc. ("LOA") (collectively, "Petitioners") seek extraordinary relief from a Superior Court order compelling broad discovery which will substantially and wrongfully infringe Fishburne's psychotherapist-patient privilege and his constitutional rights of privacy. *In the absence of emergency relief from this Court, the Superior Court's order will take effect on October 4, 1995 and render this petition moot.* Accordingly, this Court must provide Petitioners with an emergency stay so that Fishburne's constitutional and statutory rights can be addressed by this Court on the merits.

The Superior Court's discovery order effectively ruled that a diary, created and maintained by Fishburne at the direction of his psychotherapist in furtherance and for purposes of their psychotherapy sessions, was discoverable, thereby overruling the determination of a discovery referee that the diary was in fact privileged and not discoverable. The Superior Court ordered Fishburne to produce the diary in its entirety to the referee so that the referee could review that diary to "isolate" any potentially relevant entries. The Superior Court further ordered the referee to redact from any such potentially relevant entries any materials which do not pertain to whether and when Fishburne received notice that he received a part in the motion picture being litigated by the parties. The Superior Court further rejected Petitioners' request to narrow the scope of the diary entries to be reviewed by the referee (to any potentially relevant entries) and expressly made clear that Fishburne is to provide the entire diary for the referee's review. Because of the

substantial invasion of privacy and the irreparable harm to Fishburne if the Superior Court's order takes effect, this Court must in the interests of justice grant the requested stay and issue the writ sought by this petition.

Four *uncontroverted* facts establish Petitioners' right to the stay and extraordinary relief sought by this petition. *First*, Defendants do not (because they cannot) dispute that the "diary" at issue was created at the direction of Fishburne's psychotherapist in furtherance of their communications and psychotherapy sessions. Thus, the diary is part and parcel of Fishburne's psychotherapist-patient relationship. *Second*, Fishburne showed this psychotherapy diary to no one except his psychotherapist. Thus, the psychotherapy diary was "confidential" within the meaning of privilege statutes and the constitutional right of privacy. *Third*, the Superior Court's order requires Fishburne to disclose to the discovery referee -- and potentially Defendants -- *all entries in his psychotherapy diary* without regard to whether the entries relate to the subject motion picture being litigated in this lawsuit. The Superior Court's order was also entered without regard to whether any facts Defendants speculate may be contained in the psychotherapy diary could be (or has been) obtained through other means which do not infringe upon Fishburne's constitutional rights. By any reasonable analysis, the Superior Court abused its discretion in failing to narrowly tailor its discovery order to minimize any intrusion into Fishburne's privacy and psychotherapist-patient relationship. *Finally*, Petitioners' claims in the lawsuit below do not "tender" any issues pertaining to Fishburne's mental or emotional condition. Indeed, Petitioners' claims have nothing to do with Fishburne's psychotherapy, and

Petitioners have specifically disclaimed any special damages for "emotional distress" other than the routine distress expected from Defendants' fraudulent conduct. Thus, nothing contained in the diary can possibly be "directly relevant" to the issues in this litigation.

In sum, therefore, the Superior Court erroneously violated Fishburne's psychotherapist-patient privilege and constitutional right of privacy when it ordered him to produce in its entirety a highly sensitive and confidential diary which he created and maintained at the specific direction of his psychotherapist and which he used exclusively in connection with his psychotherapy. Petitioners' claims in the action below are not based in any way upon evidence of Fishburne's mental or psychological condition. The Superior Court's order compelling disclosure of all of Fishburne's psychotherapy diary to the discovery referee is not narrowly tailored to provide the least possible intrusion upon Fishburne's constitutional rights. Thus, the Superior Court acted far in excess of its discretion. Accordingly, this Court must issue a temporary stay of the Superior Court order pending this Court's review of this petition for extraordinary relief. As discussed below, the facts of this petition compel this Court to grant the extraordinary relief sought by Petitioners.

FACTUAL SUMMARY

Petitioners' claims below are premised on their allegations that Defendants and Real Parties In Interest ("Defendants") breached their agreement to utilize Fishburne's acting services contract for the role of "Zeus,"

in the second starring position opposite of Bruce Willis in this summer's hit movie, *Die Hard With A Vengeance* (the "Movie"). Defendants contacted Petitioners' representatives in April 1994 to secure Fishburne's services for the Movie. After determining that Fishburne would be available to render his acting services for the Movie during Defendants' anticipated production schedule, the parties quickly agreed upon the compensation to be paid to Petitioners on a "pay or play" basis. The parties then concluded an agreement on the "billing and credit" to be afforded to Fishburne for his role in the Movie. Notwithstanding this agreement on all material terms, Defendants in mid-June 1994 repudiated the agreement and replaced Fishburne with another actor (for significantly lower compensation).[1/]

Fishburne filed suit against Defendants for breach of their contract as well as for Defendants' fraudulent misrepresentations. None of Fishburne's claims and allegations in the lawsuit below seek damages for emotional distress, and Petitioners have expressly disclaimed damages for emotional or mental distress except for the routine distress which would naturally result from Defendants' alleged fraud.

During discovery, Defendants sought to compel discovery of, among other things, Fishburne's psychotherapy diary which contained one or two entries relating to the Movie. The uncontroverted record below, however, established that this diary was created and maintained at the

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1. Defendant Andrew G. Vajna attempted to explain Defendants' breach by testifying that "any Joe Blow" could play the second-position role of "Zeus" and that, for foreign marketing purposes, African-American actors are essentially fungible and of no economic value. (Vajna Depo. at 162-65; App. Exh. 3 at 0048-51).

specific direction of Fishburne's psychotherapist, for the sole purpose of facilitating Fishburne's psychotherapy sessions, and was maintained in a strictly confidential manner. Under these facts, the discovery referee ruled that Fishburne's diary, created and maintained at the direction of his psychotherapist for the purpose of facilitating his psychotherapy sessions, was not discoverable and was in fact privileged under the statutory psychotherapist-patient privilege. In so ruling, the discovery referee did not reach, and did not address, Fishburne's constitutional rights of privacy.

The Superior Court reversed that ruling and ordered Fishburne to produce the entire diary to the referee and ordered that the referee "redact all comments, notes, etc. which do not relate to [Fishburne's] therapy, to [Fishburne's] thoughts, feelings and/or other matters not concerning [Fishburne's] entry regarding when he was advised that he had been informed he had received a role in the subject motion picture." Petitioners timely sought reconsideration or, alternatively, clarification of this order from the Superior Court. The Superior Court granted Petitioners' motion for clarification and made clear that Petitioners were indeed required to produce the entire psychotherapy diary to the discovery referee. The referee would then be required to redact all materials from any entry relating to the Movie except when Fishburne was informed he received the role in the Movie.[2/] There can be no dispute that the Superior

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2. Consistent with their conduct in the litigation below, Defendants attempted to expand the scope of the Superior Court's order to encompass matters not discussed at the hearing on Plaintiffs' motion through purported notices of ruling and proposed order. The Superior

(continued...)

Court reiterated its ruling that Fishburne was required to produce his entire psychotherapy diary to the discovery referee so that the referee would be able to review the diary in its entirety and to "isolate" all potentially relevant entries. Because of the extreme breadth of the order, and the substantial and irreparable infringement upon Fishburne's privacy, Petitioners filed this petition to protect Fishburne's privileged communications and his constitutional rights.

ALLEGATIONS OF PETITION

By this verified petition, Petitioners allege as follows:[3/]

Statement of the Case

1. Petitioners filed this action in Los Angeles County Superior Court on July 11, 1994 against Real Parties In Interest and Defendants Cinergi Productions, Inc., Cinergi Pictures Entertainment, Inc., Andrew G. Vajna and Randolph M. Paul. Petitioners' principal claims in their original complaint was for breach of contract and fraud arising from Defendants' misrepresentations.

2.(...continued)
Court made clear, however, that only entries relating to the Movie would be provided in redacted form to Defendants. (App. Exhs. 23 & 24; September 14, 1995 minute order; September 14, 1995 transcript at 1 & 4).

3. Petitioners base their allegations in this Petition on the record below submitted in the Appendix filed concurrently with this Petition.

2. After demurrers were sustained with leave to amend, Petitioners filed an amended complaint on October 3, 1994. Again, Petitioners' primary claims in their amended complaint are for breach of contract and fraud. Petitioners made no claims for emotional or mental distress. (App. Exh. 1). Indeed, Petitioners specifically disclaimed any claim for emotional distress damages, other than for the typical emotional distress which would be routinely expected to flow from Defendants' alleged conduct. (App. Exh. 14 at 0124). Defendants answered the first amended complaint on December 29, 1994. (App. Exh. 2).

3. Since amendment of the pleadings, the parties have engaged in extensive discovery. In connection therewith, a number of discovery disputes have arisen between the parties. The Superior Court referred all such discovery disputes for resolution by a private judge, the Honorable Leonard S. Wolf, Judge of the Superior Court (Retired) (the "Discovery Referee"). Included in these references were certain motions to compel filed by Defendants and ultimately heard by the Discovery Referee. Among the specific discovery Defendants moved to compel was production of a diary entry in Fishburne's psychotherapy diary, as described further below. Defendants, however, made no claim of a right to discovery of all of Fishburne's diary before the Discovery Referee. Defendants only sought production of a specific diary entry (or entries) relating to the Movie. (App. Exh. 13 at 0113). It was this entry (or entries) which the Discovery Referee ruled was not discoverable because of the statutory psychotherapist-patient privilege. (App. Exh. 13 at 0113).

4. After Petitioners (through their counsel) provided written discovery responses and produced

documents, Fishburne provided his deposition on October 4, 1994. At that deposition, Petitioners' counsel learned for the first time that Fishburne maintained a diary. Fishburne identified one entry in his diary which pertained to the Movie. After the deposition, Petitioners' counsel determined for the first time that Fishburne started and maintained his diary at the specific instruction of his psychotherapist and that no one besides Fishburne and his psychotherapist has ever seen the diary. Fishburne's psychotherapist in 1992, as part of Fishburne's counseling treatments, instructed him to keep a confidential diary containing his personal thoughts and feelings. This diary was designed to help Fishburne communicate to his therapist *alone* his personal issues and feelings encountered outside of his counseling sessions. Moreover, the psychotherapy diary was intended to help Fishburne understand and cope with personal issues as he committed those issues to writing, and the diary *has never been seen by anyone other than Fishburne and his psychotherapist*. In short, the psychotherapy diary was commenced and maintained exclusively as part of Fishburne's confidential psychotherapy treatment, at the direction of his psychotherapist.

5. Petitioners made their record before the Discovery Referee at a hearing in January 1995 on Defendants' motion to compel (among other things) production of Fishburne's psychotherapy diary. The Discovery Referee ordered Fishburne to provide a declaration relating to the foregoing facts. (App. Exh. 13 at 0114). The Discovery Referee then ruled that Defendants would be able to inquire at a further deposition of Fishburne regarding the *prima facia* showing established by Fishburne's declaration regarding his diary.

6. Defendants continued their attack on the Discovery Referee's ruling at a further hearing before the Discovery Referee on July 11, 1995. Among other things, Defendants argued that there was no showing in Fishburne's declaration of the qualifications of his psychotherapist and that the statutory privilege could not apply to the diary entry within the meaning of the psychotherapist-patient privilege under the Evidence Code.[4/] The Discovery Referee further ruled that Fishburne's declaration (at paragraph 3) sufficiently stated that he communicated the contents of his diary to his therapist. (App. Exh. 13 at 0114-15).

7. The Discovery Referee then ordered Petitioners to disclose the qualifications of Fishburne's psychotherapist to Defendants. The Discovery Referee also required Petitioners to disclaim all damages for emotional distress other than the "normal" or routine emotional distress which would ordinarily be expected from the intentional fraud that Petitioners have alleged against Defendants. Petitioners complied by letter from their counsel dated August 3, 1995. (App. Exh. 13 at 0115 & Exh. 14).

8. Defendants prepared, and the Discovery Referee executed, a report and recommendation regarding the diary entry (the "Report"). The Report set forth the Discovery Referee's conclusion that Fishburne's diary was protected from discovery by the psychotherapist-patient privilege under the Evidence Code. Defendants filed the Report with the Court on August 2, 1995. (App. Exh. 13).

9. That same day, Defendants filed an

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4. Defendants raised this issue for the first time at this second hearing after Fishburne provided his declaration consistent with the instructions of the Discovery Referee.

"objection" to the Report. (App. Exh. 12). Petitioners filed a response on August 4, 1995. (App. Exh. 15). In response to Petitioners' response, Defendants insisted that the Discovery Referee issue a supplemental report concerning the basis for his ruling that the diary entry was privileged. The Discovery Referee signed a supplemental report on August 11, 1995, which report was filed by Defendants' counsel on August 14, 1995. The Discovery Referee's supplemental report made clear:

> Although plaintiffs raised the constitutional right of privacy in their papers, I did not base my decision on the constitutional right of privacy. I deemed the constitutional issue to be moot because of my ruling that the diary was protected by the statutory psychotherapist-patient privilege. *I did not reach the broader issue of whether the diary was also protected, or otherwise protected, by the constitutional right of privacy.*

(Supplemental Report at 2; App. Exh. 18 at 0180; emphasis added).[5/]

10. On August 10, 1995 -- before the referee's supplemental report was signed or filed -- the Superior Court filed a minute order (the "August 10 Order") "accepting in part, and rejecting in part" the Discovery

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5. In their "Closing Memorandum" in support of their objection to the Report, Defendants also conceded that neither Fishburne's constitutional rights nor the relevance of the diary entry in question were ever addressed by the Discovery Referee. (App. Exh. 26 at 0140).

Referee's Report. The August 10 Order required Fishburne to produce his psychotherapy diary, in its entirety, to the Discovery Referee, who was then directed to "isolate said entry, copy said entry; redact all comments, notes, etc. which do not relate to plaintiff's therapy, to plaintiff's thoughts, feelings and/or other matters not concerning plaintiff's entry regarding when he was advised that he had been informed he received a role in the subject motion picture." The August 10 Order effectively requires the Discovery Referee to review *all* entries in Fishburne's psychotherapy diary so that he can "isolate" the one or two entries which may have relevance in this case. (App. Exh. 17).

11. On August 25, 1995, Petitioners moved for reconsideration or clarification of the August 10 Order. Petitioners based their motion on the grounds that no hearing had taken place during which Fishburne's constitutional rights were addressed. Moreover, Petitioners took issue with the breadth of the August 10 Order requiring Fishburne to disclose his entire psychotherapy diary to a third person -- i.e. the Discovery Referee -- solely to isolate the one or two entries therein which could possibly relate to the action below. (App. Exh. 19).

12. Defendants filed an opposition to Petitioners' motion for reconsideration or clarification. (App. Exh. 21).

13. Petitioners filed a reply in support of their motion. (App. Exh. 22).

14. On September 14, 1995, a hearing was held on Petitioners' motion for reconsideration or clarification. At the hearing, the Honorable Alan B. Haber, Judge of the Superior Court, made clear that there was an

error in the August 10 Order -- which inadvertently added the word "not" before the list of the subject matters to be redacted from the diary entry. (App Exh. 24 at 0462). Nevertheless, Judge Haber made clear that he believed that an order compelling Fishburne to disclose his psychotherapy diary to a third person did not violate the statutory psychotherapist-patient privilege or Fishburne's constitutional rights of privacy -- even though the Court acknowledged that "98 or 99 percent of the material" in the psychotherapy diary could not possibly be relevant. (*Id.* at 0464). The Superior Court ordered Fishburne to produce the entire diary to the Discovery Referee so that the Discovery Referee could isolate any entries which pertained to the Movie. (*Id.* at 0465).

15. The Superior Court's only statement justifying such a substantial intrusion into Fishburne's rights of privacy and his psychotherapist-patient relationship was made in response to Petitioners' statement that compelled disclosure of the entire diary to any person outside the psychotherapist-patient relationship violates Fishburne's right of privacy:

> THE COURT: Well, I most certainly am disagreeing with you. Let's not lose sight of the fact that your client -- and he certainly has a right to do it as the Plaintiff in this litigation -- he's seeking a big chunk of money from the Defendant [and] there is a material issue as to whether or not he was told whether or not he had the role in this motion picture . . . .

(App. Exh. 24 at 0465). The Superior Court rejected Petitioners' arguments that such discovery was available, and was in fact provided, by other methods which did not infringe upon Fishburne's constitutional rights. (*Id.* at 0465-66). The transcript of the September 14, 1995 hearing is attached to the Appendix as Exhibit 24.[6] The Court entered a minute order on Petitioners' motion for reconsideration or clarification that same day. (App. Exh. 23 at 0459).

16. The Superior Court ordered Petitioners to produce the entire psychotherapist diary to the Discovery Referee on or before October 4, 1995. (App. Exh. 23).

17. The parties then submitted competing versions of notices of rulings and proposed orders. (App. Exhs. 25-33). Petitioners received a copy of the transcript of the September 14, 1995 hearing on September 25, 1995. This petition followed.

Statement of Facts

18. In April 1994, Defendants approached Petitioners' representatives to persuade Fishburne to agree to portray the second lead role in the Movie. (App. Exh. 1 at 0006). After determining that Fishburne would be available during Defendants' anticipated production schedule for the Movie, the parties agreed upon the compensation to be paid to Petitioners on a "pay or play" basis. (*Id.* at 0008-09). The parties thereafter reached agreement on the major issues

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6. Petitioners were unable to file this writ petition earlier then they did because the transcript was not received until the late afternoon on September 25, 1995.

regarding the "billing and credit" to be accorded to Fishburne for the Movie. Thus, the parties' dispute in the lawsuit below centers on whether Defendants had agreed to all material terms of the parties' agreement (they did) and whether Defendants' bad faith conduct immediately prior to Defendants' breach amounted to a fraud on Petitioners.

19. Petitioners' claims in the lawsuit below do not seek any special damages for emotional distress. (App. Exh. 1). Petitioners assert no claims for intentional or negligent infliction of emotional distress. Indeed, Petitioners have expressly disclaimed any damages for emotional distress. Petitioners only seek the typical upset which would normally result from Defendants' fraudulent conduct. (App. Exh. 14).

20. Accordingly, Fishburne's mental condition or emotional state is not at issue in this litigation. It is undisputed that Fishburne's psychotherapy diary was created and maintained at the specific direction of his psychotherapist, for purposes of facilitating and in connection with his counseling sessions. It is also undisputed that no person, other than Fishburne and his psychotherapist, has ever seen or reviewed this highly confidential diary. Under well established law, Defendants are not entitled to discovery of Fishburne's psychotherapy diary.

PRAYER

WHEREFORE, Petitioners pray that this Court:

1. Issue an emergency and immediate stay of the Superior Court's order compelling production of Fishburne's psychotherapy diary in its entirety pending this Court's decision on the merits of Petitioners' petition for extraordinary relief;

2. Issue a peremptory writ of mandate or other appropriate writ in the first instance to compel the Superior Court to vacate its order compelling production of the psychotherapy diary;

3. Direct the Superior Court to enter an order denying production of the psychotherapy diary to any third person on the grounds of the psychotherapist-patient privilege and the constitutional rights of privacy and precluding from discovery all confidential matters within the psychotherapist-patient relationship;

4. Award costs of this petition to Petitioners; and

5. Grant such other relief the Court deems just and proper.

DATED: September 28, 1995

Andrew M. White
Melvin N.A. Avanzado
David E. Fink
CHRISTENSEN, WHITE, MILLER, FINK & JACOBS, GLASER & SHAPIRO, LLP

By_____
Melvin N.A. Avanzado
Attorneys for Plaintiffs and Petitioners
LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC.

VERIFICATION

I have read the foregoing document entitled PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF SUPERSEDEAS, MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES REGARDING DISCOVERY ORDER IN VIOLATION OF PETITIONERS' PSYCHOTHERAPIST-PATIENT PRIVILEGE AND CONSTITUTIONAL RIGHT OF PRIVACY and know its contents.

I am an associate with Christensen, White, Miller, Fink & Jacobs, attorneys of record to Petitioners Laurence Fishburne and The LOA Productions, Inc. Mr. Fishburne is currently absent from the County of Los Angeles, State of California, where such attorneys have their offices. I make this verification for and on behalf of Mr. Fishburne for that reason.

I have read the foregoing document. I am informed and believe on that basis allege that the matters stated in it are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 28th day of September, 1995 at Los Angeles, California.

_____

Melvin N.A. Avanzado

MEMORANDUM OF POINTS AND AUTHORITIES

I

THIS COURT SHOULD GRANT THE REQUESTED WRIT BECAUSE THE SUPERIOR COURT ABUSED ITS DISCRETION

A writ of "mandate is proper to control judicial discretion when that discretion has been abused [by the Superior Court]." *State Farm Mutual Automobile Ins. Co. v. Superior Court* (1956) 47 Cal. 2d 428, 432 [304 P.2d 13]. "Discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." *State Farm Mutual Automobile Ins. Co.*, 47 Cal. at 432 (citing *Berry v. Chaplin* (1946) 74 Cal. App. 2d 669, 672 [169 P.2d 453]). A writ of mandate is also appropriate where the trial court should have exercised its discretion a particular way but refused to do so. *Robbins v. Superior Court* (1985) 38 Cal. 3d 199, 205 [211 Cal. Rptr. 398].

Abuse of discretion does not require a showing that the trial court acted in a "whimsical, arbitrary, or capricious" manner but only that its exercise of discretion violated applicable legal principles. *Department of Parks and Recreation v. State Personnel Board* (1991) 233 Cal. App. 3d 813, 831 n. 3 [284 Cal. Rptr. 839]. In addition, a writ of mandate should be issued upon a showing that there is no other adequate remedy and that irreparable injury will result if relief is not granted. *Omaha Indem. Co. v. Superior Court* (1989) 209 Cal. App. 3d 1266, 1273-75 [258 Cal. Rptr. 66]. In light of these standards, relief by petition

for writ of mandate is appropriate when (as here) a discovery order of the Superior Court threatens to infringe wrongfully upon a litigant's psychotherapist-patient privilege and concomitant constitutional rights of privacy. *Britt v. Superior Court* (1978) 20 Cal. 3d 844, 852-64 [143 Cal. Rptr. 695] (California Supreme Court granting petition for writ of mandate to prevent discovery order infringing upon psychotherapist-patient privilege and other constitutional rights); *Davis v. Superior Court* (1992) 7 Cal. App. 4th 1008, 1020 [9 Cal. Rptr. 2d 331] (petition for writ of mandate granted when order infringed upon right of privacy even though statutory psychotherapist-patient privilege did not apply).

In this case, as discussed below, the Superior Court abused its discretion by its order compelling Fishburne to disclose his entire diary despite both the psychotherapist-patient privilege and his constitutional right of privacy. This Court should, and must in the interests of justice, issue the requested stay and writ.

II

THE SUPERIOR COURT ABUSED ITS DISCRETION IN REQUIRING IN CAMERA PRODUCTION OF PSYCHOTHERAPIST-PATIENT MATERIALS

The burden is on Defendants, who seek constitutionally protected information, to establish that such matters are *directly relevant* to the litigation. *Harris v. Superior Court* (1992) 3 Cal. App. 4th 661, 665 [4 Cal. Rptr. 2d 564]. Defendants made no showing below. Thus, as detailed below, the Superior Court abused its discretion in compelling Fishburne to disclose his diary, in complete

disregard of both his statutory psychotherapist-patient privilege and his constitutional right of privacy.

A. *Discovery Of The Diary Is Precluded By The Statutory Psychotherapist-Patient Privilege Under The Evidence Code*

It is well established in California that the psychotherapist-patient relationship is afforded a privilege precluding the disclosure of confidential communications arising during the course of that relationship. Section 1014 of the California Evidence Code expressly provides that a patient has a privilege to refuse to disclose, and to prevent others from disclosing, a confidential communication between him and his psychotherapist.[7]

The California Supreme Court specifically recognizes that the statutory privilege afforded to the psychotherapist-patient relationship is also based on rights guaranteed to all persons by the United States Constitution. *In re Lifschutz* (1970) 2 Cal. 3d 415, 431-32 [85 Cal. Rptr. 829] (psychotherapy comes within "zones of privacy" guaranteed by the Bill of Rights) (citing *Griswold v. Connecticut* (1965) 381 U.S. 479, 484 [85 S. Ct. 1678]). Accordingly,

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7. Confidential communication for purposes of the privilege means information transmitted between patient and psychotherapist in the course of that relationship and in confidence by a means which, as far as the patient knows, discloses the information to no third persons. *See Carlton v. Superior Court* (1968) 261 Cal. App. 2d 282, 288 [67 Cal. Rptr. 568] (citing Cal. Evid. Code § 992 governing physician-patient communications).

> because of the potential encroachment upon constitutionally protected rights of privacy by the compelled disclosure of confidential communications between a patient and his psychotherapist, trial courts should carefully control compelled disclosures in this area. Thus, *the psychotherapist-patient privilege is to be liberally construed in favor of the patient*.

Roberts v. Superior Court (1973) 9 Cal. 3d 330, 337 [107 Cal. Rptr. 309] (citations omitted; emphasis added; citng *Lifschutz*, 2 Cal. 3d at 423, 431-32).

In this case, there is no dispute that the diary at issue was created and maintained at the specific direction of Fishburne's psychotherapist for purposes of facilitating their communications during Fishburne's psychotherapy sessions. The Discovery Referee expressly found that Petitioners established their *prima facie* burden to show that the statutory evidentiary privilege applied to these communications. The Superior Court expressly found that "98 to 99 percent" of the materials in the diary would have nothing to do with this lawsuit. Nevertheless, the Superor Court ordered Fishburne to produce his entire diary so that the Discovery Referee could "isolate" potentially relevant entries. There can be no question that the Superior Court's order effectively obliterates Fishburne's privilege -- a clear

abuse of the Superior Court's discretion.[8] This Court must issue the requested stay and writ.

B. *The Broader Constitutional Protection Of The Right Of Privacy Independently Precludes Compelled Production Of The Diary*

Even if the statutory privilege were not applied to bar production of Fishburne's diary, it is well established that under both the California and United States Constitutions that Fishburne has an inalienable, fundamental right of privacy which independently precludes discovery of this psychotherapy diary. *Board of Trustees v. Superior Court* (1981) 119 Cal. App. 3d 516, 524 [174 Cal. Rptr. 116]. "When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information." *Board of Trustees*, 119 Cal. App. 3d at 525; *Morales v. Superior Court* (1979) 99 Cal. App. 3d 283, 290 [160 Cal. Rptr. 194]; *Fults v. Superior Court* (1979) 88 Cal. App. 3d 899, 904 [152 Cal. Rptr. 210]. Thus, even where discovery of private information is found to be directly relevant to issues in an ongoing civil litigation, it cannot automatically be allowed. *Board of Trustees*, 119 Cal. App. 3d at 525. Rather, there must be a careful balancing of "compelling public need" for discovery against the "fundamental right of privacy." *City*

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8. The Superior Court was apparently persuaded (incorrectly) that Petitioners' claim for damages ("a big chunk of money") was sufficient to intrude upon Fishburne's private and incontrovertibly *privileged* affairs. (September 14, 1995 transcript at 5; App. Exh. 24 at 0465).

of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 130 [164 Cal. Rptr. 539]; *Board of Trustees*, 119 Cal. App. 3d at 525.

The constitutional rights which Petitioners are attempting to vindicate are co-extensive and actually broader than the statutory psychotherapist-patient privilege. As recently reaffirmed by the Court of Appeal, it is well established that

> [T]he statutory privilege and the constitutional privacy right are both interrelated and separate. The psychotherapist-patient privilege is one aspect of the right of privacy, but it and any exceptions are subject to constitutional standards. Because resolution of the issue regarding privilege in favor of real party would not necessarily be dispositive of the issue of privacy, we shall first address the broader privacy issue. In so doing, we conclude that the court's order of disclosure violated petitioner's right of privacy.

Davis, 7 Cal. App. 4th at 1013 (citations omitted; citing *Lifschutz*, *supra*; *Heda v. Superior Court* (1990) 225 Cal. App. 3d 525, 528 n. 1 [275 Cal. Rptr. 136]; *Cutter v. Brownbridge* (1986) 183 Cal. App. 3d 836, 845-46 [228 Cal. Rptr. 545]). Thus, the constitutional privilege is often held to apply even if the statutory privilege does not protect the subject matters at issue. *Davis*, 7 Cal. App. 4th at 1014 (citing *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal. 3d 652, 656 [125 Cal. Rptr. 553]).

In *Davis*, defendant sought, among other things, plaintiff's psychotherapist records in her personal injury action stemming from an automobile accident. The *Davis* plaintiff had expressly limited her claim for emotional distress damages to "pain and suffering" associated with her physical injuries. The *Davis* defendant, like Defendants in this case, argued that the plaintiff had failed to establish the basis for her assertion of a statutory psychotherapist-patient privilege. The Court of Appeal rejected the argument, holding that any defect with respect to the statutory privilege did not bar the application of the "much broader zone of privacy." *Davis*, 7 Cal. App. 4th at 1020 (citing *Mahoney v. Superior Court* (1983) 142 Cal. App. 3d 937, 940 [191 Cal. Rptr. 425]). Thus, the *Davis* court reversed (upon that plaintiff's petition for a writ of mandate) the trial court's order requiring production of such psychotherapist records as violating that plaintiff's constitutional rights of privacy. *Davis*, 7 Cal. App. 4th at 1020.[2/]

Accordingly, even if the statutory privilege were insufficient to preclude discovery of Fishburne's psychotherapy diary, Fishburne's constitutional right of privacy precludes such discovery independently from the operation of the psychotherapist-patient privilege. Fishburne's right of privacy governs the entirety of his

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9. The *Davis* court also found that, like Defendants in this case, there had been no showing of direct relevance of sought records to the issues in that litigation: "[R]ather, real party only speculates that in the records requested there could be material which might be relevant to various issues in the action, such as the nature and extent of emotional distress suffered, causation of the accident and petitioner's condition at the time of the accident. *Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issues does not suffice.*" *Davis*, 7 Cal. App. 4th at 1017 (emphasis added).

psychotherapist-patient relationship -- including the psychotherapy diary he created and maintained in connection with his treatment. The Superior Court's order requiring Fishburne to produce that diary in its entirety to the Discovery Referee violates Fishburne's constitutional right of privacy -- particularly since the Superior Court recognized that "98 or 99 percent" of the diary cannot possibly be relevant. Like *Davis*, Fishburne's constitutional rights cannot take a back seat to such speculation. This Court must grant the requested stay and writ in the interests of justice.

C. *Petitioners' Filing Of A Lawsuit Does Not Entitle Defendants To Trample Upon Fishburne's Constitutional Rights*

The Superior Court further abused its discretion when it erroneously viewed Petitioners' claim for "a big chunk of money" (the Superior Court's term) from Defendants as a license to trespass upon Fishburne's constitutional rights and statutory privileges. Section 1016 of the California Evidence Code, however, delineates the limits of the "patient-litigant" exception to the psychotherapist-patient privilege. Specifically, the "patient-litigant" exception provides that "[t]here is no privilege . . . as to a communication relevant to an issue concerning the mental or emotional condition of a patient *if such issue has been tendered* by . . . the patient." Cal. Evid. Code § 1016 (Deering 1986) (emphasis added). The California Supreme Court has made clear that the implied waiver contemplated by this exception "must be construed not as a complete waiver of the privilege but only as a limited waiver

concomitant with the purposes of the exception." *Britt*, 20 Cal. 3d at 864-65 ("[D]isclosure can be compelled only with respect to those mental conditions the patient-litigant has '[d]isclosed . . . by bringing an action in which they are in issue' [citation]; communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged." (quoting *Lifschutz*, 2 Cal. 3d at 435; *Roberts*, 9 Cal. 3d at 337-39)).

In this case, Petitioners have expressly disclaimed any damages for emotional distress except for the normal or routine distress which would be expected from Defendants' fraudulent conduct. In other words, Petitioners have not "tendered" any issue pertaining to Fishburne's emotional or mental condition. Fishburne's psychotherapy cannot possibly be at issue. None of the matters contained in Fishburne's psychotherapy diary can possibly be relevant to this case -- with the sole exception recognized by the Superior Court of notice to Fishburne of whether he received the part in the Movie. That fact can be (and has been) discovered through less intrusive discovery methods. Accordingly, Fishburne's diary is not directly relevant to the subject matters in this litigation. Petitioners do not waive their fundamental constitutional rights or their statutory privileges simply because they filed a lawsuit seeking substantial damages resulting from Defendants' wrongful conduct. This Court must granted the requested stay and issue the writ to protect Fishburne's rights.

D. *California Law And Policy Establishes That Even Compelled Production* In Camera *Is A Significant Intrusion Into The Psychotherapist-PatientRelationship*

Section 915 of the California Evidence Code illustrates strong California policies which recognize that even an *in camera* review of privileged and constitutionally protected materials is a substantial invasion of rights. Section 915 permits disclosure *in camera* only of two limited subject matters not relevant here. Thus, as numerous courts have recognized, *in camera* inspection of psychological records is not permitted because of the substantial and irreparable invasion upon a patient's relationship with his psychotherapist. *See Grosslight v. Superior Court* (1977) 72 Cal. App. 3d 502, 504 [140 Cal. Rptr. 278] (*in camera* review of psychological records not permitted under Section 915); *Carlton v. Superior Court* (1968) 261 Cal. App. 2d 282, 292-93 [67 Cal. Rptr. 568] (*in camera* review of hospital records not permitted under Section 915).

Thus, Section 915 and the foregoing cases recognize that any compelled production of psychotherapist-patient information, even if only *in camera*, is a substantial intrusion into Fishburne's rights. Defendants do not (and cannot) provide any authority which permits any compelled *in camera* review of materials protected by the psychotherapist-patient privilege or the constitutional right of privacy governing the psychotherapist-patient relationship. The Superior Court itself recognized that "98 to 99 percent of the material" ordered produced to the Discovery Referee cannot possibly be relevant. The Superior Court's order is

a substantial invasion of Fishburne's rights and is a clear abuse of its discretion. In light of the clear prohibition of Section 915 and the cases decided thereunder of a compelled *in camera* review of psychotherapist-patient materials, and the extreme breadth of the Superior Court's discovery order, this Court must issue the requested stay and writ.

E. *The Superior Court Order Compelling Production Of The Entire Diary Is Not Narrowly Tailored To Accomplish Any Legitimate Discovery Objectives*

As discussed above, the Superior Court's order cannot possibly be narrowly tailored to minimize the intrusion into Fishburne's constitutional rights. For example, the Superior Court rejected alternate methods to discover the only purportedly relevant "fact" possibly contained in the psychotherapy diary -- i.e. notice to Fishburne of "[w]hether Mr. Fishburne got the part" and any other entries "relating to the movie." (September 14, 1995 transcript at 1 & 4; App. at 0461 & 64).[10] Defendants could have propounded a specific interrogatory to elicit these facts which would not unduly invade Fishburne's constitutional rights and privileges.

More importantly, the Superior Court rejected Petitioners' request to produce only the entries relating to the Movie to the Discovery Referee for his review. (September

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10. Indeed, Defendants have never been precluded from discovering these facts and asked many questions of Petitioners' witnesses about these issues.

14, 1995 transcript at 4-5; App. at 0464-65). Thus, the Superior Court ordered Petitioners to provide all of Fishburne's diary to the Discovery Referee so that he can "isolate" -- after reviewing all of Fishburne's private thoughts and communications with his psychotherapist -- the potentially relevant entries to which he would make additional redactions. (*Id.*).

In short, the Superior Court refused even to consider any less intrusive alternatives to its order requiring Petitioners to produce all of Fishburne's diary to the Discovery Referee. As such, the order cannot possibly be narrowly tailored to accomplish any legitimate discovery objectives. Without the stay and extraordinary relief sought here, Fishburne's constitutional rights and statutory privileges would be unnecessarily and wrongfully infringed by this abuse of the Superior Court's discretion. This Court must in the interests of justice issue the requested writ.

III
CONCLUSION

For all the foregoing reasons, therefore, Petitioners Laurence Fishburne and The LOA Productions, Inc. respectfully request that this Court immediately issue a writ of supersedeas or other appropriate stay order and a writ of mandate or other appropriate relief directing the Superior Court of the State of California for the County of Los Angeles vacate its September 14, 1995 order (clarifying its August 10, 1995 order) compelling Laurence Fishburne to produce his entire psychotherapy diary created and maintained at the direction of his psychotherapist as part of

his psychotherapist-patient relationship and psychotherapy.

DATED: September 28, 1995

Andrew M. White
Melvin N.A. Avanzado
David E. Fink
CHRISTENSEN, WHITE,
MILLER, FINK & JACOBS

By_____
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THE LOA PRODUCTIONS,
INC.

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PROOF OF SERVICE BY HAND DELIVERY
(To be executed by secretary)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action My business address is that of Christensen, White, Miller, Fink, Jacobs, Glaser & Shapiro as set forth on the first page of the document to which this Proof is attached.

I served the below listed document(s) described as: PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF SUPERSEDEAS, MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES REGARDING DISCOVERY ORDER IN VIOLATION OF PETITIONERS' PSYCHOTHERAPIST-PATIENT PRIVILEGE AND CONSTITUTIONAL RIGHT OF PRIVACY on September 28, 1995, on all other parties to this action by placing a [X] true copy ☐ original of the above document enclosed in a sealed envelope addressed as follows:

See Attachment to Proof of Service

I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on September 28, 1995 at Los Angeles, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Monica Metoyer _____

(Type or print name) (Signature

ATTACHMENT TO PROOF OF SERVICE

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The Honorable Leonard S. Wolf
Judge of the Superior Court (Retired)
413 Howland Canal
Venice, California 90291

Discovery Referee
(By Mail)

No. _____

IN THE
SUPREME COURT OF CALIFORNIA

LAURENCE FISHBURNE and
THE LOA PRODUCTIONS, INC., a New York corporation,

Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
(The Honorable Alan B. Haber)
Case No. SC 031 787,

Respondent.

CINERGI PRODUCTIONS, INC., a California corporation,
CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation,
ANDREW G. VAJNA and RANDOLPH M. PAUL,

Defendants and Real Parties In Interest.

EMERGENCY AND IMMEDIATE STAY REQUESTED PENDING

After An Order Summarily Denying A Petition For Writ Of Mandate Entered By The Court of Appeal, Second Appellate District, Division Two
Second Civil Case No. B 096 113

PETITION FOR REVIEW

CHRISTENSEN, WHITE, MILLER, FINK, JACOBS, GLASER & SHAPIRO

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No. _____

IN THE

SUPREME COURT OF CALIFORNIA

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC., a New York corporation,

Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES (The Honorable Alan B. Haber) Case No. SC 031 787,

Respondent.

CINERGI PRODUCTIONS, INC., a California corporation, CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation, ANDREW G. VAJNA and RANDOLPH M. PAUL,

Defendants and Real Parties In Interest.

After An Order Summarily Denying A Petition For Writ Of Mandate
Entered By The Court of Appeal, Second Appellate District, Division Two
Second Civil Case No. B 096 113

PETITION FOR REVIEW

ISSUES PRESENTED

1. Whether the right of privacy guaranteed to all persons under the California and United States Constitutions precludes the Superior Court from compelling production of a patient's entire diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

2. Whether the psychotherapist-patient privilege under section 1014 of the California Evidence Code precludes the Superior Court from compelling the production of a patient's entire diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

3. Whether the fundamental protections afforded by the right of privacy guaranteed to all persons under the California and United States Constitutions and the statutory psychotherapist-patient privilege under the

California Evidence Code preclude a Superior Court from compelling -- without conducting any inquiry regarding the relevance of the contents of that diary or journal -- even an *in camera* production of a patient's diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship without conducting any inquiry regarding the relevance of the contents of that diary or journal.

INTRODUCTION AND SUMMARY

Petitioners Laurence Fishburne ("Fishburne") and The LOA Productions, Inc. ("LOA") (collectively, "Petitioners") seek an emergency stay and relief from the Court of Appeal's November 1, 1995 order summarily denying their petition for peremptory writ of mandate. Fishburne is a critically acclaimed actor. Most recently, Fishburne was nominated for an Academy Award for his portrayal of Ike Turner in the 1992 movie, *What's Love Got To Do With It*, played the lead role of Colonel Hannibal Lee in the 1995 Home Box Office movie, *Tuskegee Airmen*, the story about the first African American pilots in World War II. In the action below, Fishburne and his production company, LOA, sued a production company and its principals for repudiating a contract for Fishburne to appear in this summer's hit motion picture, *Die Hard With A Vengeance*. Fishburne's participation in *Die Hard With A Vengeance* would have been his first performance in a "blockbuster" or commercial action motion picture but for the production company's breach.

In the litigation below, the production company defendants moved to compel production of a

portion of Fishburne's diary or journal which he created at the direction of his psychotherapist and maintained during the course of his treatment with that psychotherapist. A private discovery referee appointed by the Superior Court denied the motion. The Superior Court reversed that order and compelled production of *Fishburne's entire psychotherapist diary* without holding any hearings on the record to balance the competing interests between Fishburne's fundamental constitutional rights of privacy governing his psychotherapist-patient relationship (and evidentiary privileges) and the purported relevance of entries in the psychotherapist diary. The Second District Court of Appeal issued a temporary stay but ultimately denied Petitioners' request for a peremptory writ of mandate. The Court of Appeal also invoked the temporary stay.

Without an immediate, temporary stay from this Court, Petitioners would be precluded from seeking this Court's review of substantial constitutional rights under both the California and United States Constitutions protecting the psychotherapist-patient relationship, the scope of the psychotherapist patient privilege under the California Evidence Code and the relationship between the fundamental constitutional protections afforded by the right of privacy and the statutory privilege, both of which should operate to protect the psychotherapist-patient relationship. Such a review is necessary in light of the important fundamental rights at issue and the deleterious effects that orders such as those issued by the Superior Court in this case would inflict upon psychotherapist-patient relationships (and all relationships between mental health professionals and their patients) throughout the State of California. Accordingly, Petitioners request that the Court issue an immediate stay

pending its review of the important issues raised in this petition.

NATURE OF THE CASE AND PROCEDURAL HISTORY

F. The Underlying Claims

Petitioners contend that they entered into a contract with Defendants and Real Parties In Interest ("Defendants") through which Fishburne would appear in the role of "Zeus" in the second starring position opposite Bruce Willis in this summer's hit movie, *Die Hard With A Vengeance* (the "Movie"). Defendants contacted Petitioners' representatives in April 1994 to secure Fishburne's services for the Movie. After determining that Fishburne would be available to render his acting services for the Movie with certain adjustments to Defendants' anticipated production schedule, the parties quickly agreed upon the compensation to be paid to Petitioners on a "pay or play" basis. The parties then concluded an agreement on the "billing and credit" Fishburne was to receive for his role in the Movie. Notwithstanding this agreement on all material terms, Defendants in mid-June 1994 repudiated the agreement and replaced Fishburne with another actor -- for significantly lower compensation.[1/]

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1. Defendant Andrew G. Vajna attempted to explain Defendants' breach by testifying that any "Joe Blow" could play the second-position role of "Zeus" and that, for foreign marketing purposes, African-American actors are essentially

(continued...)

Fishburne filed suit against Defendants for breach of contract as well as for Defendants' fraudulent misrepresentations. None of Fishburne's claims and allegations in the lawsuit below seek damages for emotional distress, and Petitioners have expressly disclaimed damages for emotional or mental distress except for the routine distress which would naturally result from Defendants' alleged fraud.

G. The Dispute Concerning Laurence Fishburne's Psychotherapist Diary

During discovery, Defendants sought to compel discovery of, among other things, Fishburne's psychotherapy diary. This psychotherapy diary, although containing one or two entries relating to the Movie, was otherwise unrelated to any issues in the litigation. The uncontroverted record below, however, establishes that this diary was created and maintained at the specific direction of Fishburne's psychotherapist, for the sole purpose of facilitating Fishburne's psychotherapy sessions, and was maintained in a strictly confidential manner. Under these facts, the discovery referee ruled that Fishburne's diary, created and maintained at the direction of his psychotherapist for the purpose of facilitating his psychotherapy sessions, was not discoverable and was in fact privileged under the statutory psychotherapist-patient privilege. (Tab No. 1). In so ruling, the discovery referee did not reach, and did not

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1.(...continued)
fungible and of no economic value. (Vajna Depo. at 162-65).

address, Fishburne's constitutional rights of privacy. (Tab No. 2).

Upon Defendants' objections to that ruling, the Superior Court reversed that ruling and ordered Fishburne to produce the entire diary to the referee and ordered that the referee "redact all comments, notes, etc. which do not relate to [Fishburne's] therapy, to [Fishburne's] thoughts, feelings and/or other matters not concerning [Fishburne's] entry regarding when he was advised that he had been informed he had received a role in the subject motion picture." (Tab No. 3). Petitioners timely sought reconsideration or, alternatively, clarification of this order from the Superior Court. The Superior Court granted Petitioners' motion for clarification and made clear that Petitioners were indeed required to produce the entire psychotherapy diary to the discovery referee. (Tab No. 4). The Superior Court conducted no hearings and made no inquiry to balance the competing interests of Fishburne's right of privacy and any legitimate discovery objections.

H. The Court Of Appeal's Summary Denial Of Writ Petition

On September 28, 1995, Petitioners filed a petition for an emergency stay and for a writ of mandate with the California Court of Appeal, Second Appellate District, to reverse the Superior Court's order compelling production of Fishburne's psychotherapy diary. The Court of Appeal issued a temporary stay on October 3, 1995. The Court of Appeal then summarily denied the petition and dissolved the temporary stay by order dated November 1, 1995. (Tab No. 5). This petition to this Court followed.

REASONS WHY THE PETITION SHOULD BE GRANTED

ISSUE NO. 1: Whether the right of privacy guaranteed to all persons under the California and United States Constitutions precludes the Superior Court from compelling production of a patient's entire diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

This Court has specifically recognized that the statutory privilege afforded to the psychotherapist-patient relationship is also based on rights guaranteed to all persons by the United States Constitution. *In re Lifschutz* (1970) 2 Cal. 3d 415, 431-32 [85 Cal. Rptr. 829] (psychotherapy comes within "zones of privacy" guaranteed by the Bill of Rights) (citing *Griswold v. Connecticut* (1965) 381 U.S. 479, 484 [85 S. Ct. 1678]). Accordingly,

> because of the potential encroachment upon constitutionally protected rights of privacy by the compelled disclosure of confidential communications between a patient and his psychotherapist, trial courts should carefully control compelled disclosures in this area. Thus, *the psychotherapist-patient privilege is to be liberally construed in favor of the patient.*

Roberts v. Superior Court (1973) 9 Cal. 3d 330, 337 [107 Cal. Rptr. 309] (citations omitted; emphasis added; citing *Lifschutz*, 2 Cal. 3d at 423, 431-32).

Only one case in the Courts of Appeal has specifically recognized the relationship between the constitutional right of privacy and the statutory privilege protecting psychotherapist-patient communications. *Davis v. Superior Court* (1992) 7 Cal. App. 4th 1008 [9 Cal. Rptr. 2d 331]. In *Davis*, the Fifth District Court of Appeal granted a petition for writ of mandate when a Superior Court order infringed upon the constitutional right of privacy even though the statutory psychotherapist-patient privilege did not apply. *Davis*, 7 Cal. App. 4th at 1020.

This case presents the Court with the opportunity to elaborate on its holdings in *Lifschutz* and *Roberts* to make clear that the constitutional right of privacy also protects the psychotherapist-patient relationship regardless of the application of the statutory protections provided by the Evidence Code.

ISSUE NO. 2: Whether the psychotherapist-patient privilege under section 1014 of the California Evidence Code precludes the Superior Court from compelling the production of a patient's entire diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

Section 1014 of the California Evidence Code expressly provides that a patient has a privilege to refuse to disclose, and to prevent others from disclosing, a confidential communication between him and his psychotherapist. A confidential communication for purposes

of the privilege means information transmitted between patient and psychotherapist in the course of that relationship and in confidence by a means which, as far as the patient knows, discloses the information to no third persons. *County of Alameda v. Superior Court* (1987) 194 Cal. App. 3d 254, 258 [239 Cal. Rptr. 400] (quoting Cal. Evid. Code § 1012). Although this Court's holding in *Roberts* directs courts to construe liberally the psychotherapist-patient privilege, Petitioners have found no cases which address whether the "confidential communications" sought to be protected under the statutory privilege must have been actually communicated between psychotherapist and patient.

This case presents the Court with an opportunity to determine whether the psychotherapist-patient privilege is limited or is not limited to actual communications between a psychotherapist and his or her patient.

ISSUE NO. 3: Whether the fundamental protections afforded by the right of privacy guaranteed to all persons under the California and United States Constitutions and the statutory psychotherapist-patient privilege under the California Evidence Code preclude a Superior Court from compelling -- without conducting a hearing regarding the relevance of the contents of that diary or journal -- even an *in camera* production of a patient's diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

This Court's decisions in *Lifschutz* and *Roberts* held that the fundamental rights of all persons and the

importance of the psychotherapist-patient relationship to modern society compel all courts to carefully scrutinize requested discovery of matters within the psychotherapist-patient relationship. In conjunction with the statutory privilege under Section 1014 of the Evidence Code, courts have consistently reviewed attempts to discover facts pertaining to the psychotherapist-patient relationship to strike a balance between legitimate discovery needs and the societal interest in protecting persons' fundamental rights. *See, e.g., Davis*, 7 Cal. App. 4th at 1014.

While courts have reviewed many instances where patient records of a psychotherapist are sought or communications between patient and psychotherapist were the subject of discovery inquiries, Petitioners have found no cases which compel an *in camera* production of documents created within the course of a psychotherapist-patient relationship even when those documents admittedly had little (if any) relevance to the pending litigation. Moreover, Petitioners have found no cases which pertain to documents created by a patient at the direction of his psychotherapist and in furtherance of his counseling sessions but which may have not been communicated with his psychotherapist.[2/]

This case presents this Court with the opportunity to determine whether the constitutional right of privacy or the statutory psychotherapist-patient privilege (or both operating in concert) preclude discovery of materials (whether *in camera* or to the parties) created by the patient

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2. While Fishburne has communicated portions of his diary to his psychotherapist, it is unclear whether he has shown the particular entry relating to the Movie to his psychotherapist. For purposes of this petition, therefore, Petitioners assume that the entry in question was not actually communicated to Fishburne's psychotherapist.

at his psychotherapist's direction for the purposes of facilitating or in furtherance of their counseling sessions but which may not have been actually communicated between the patient and psychotherapist.

LEGAL DISCUSSION

A. The Superior Court Order Compelling Production Of The Psychotherapist Diary Violates Fishburne's Right Of Privacy

Under both the California and United States Constitutions, Fishburne has an inalienable, fundamental right of privacy which independently precludes discovery of his psychotherapy diary. *Board of Trustees v. Superior Court* (1981) 119 Cal. App. 3d 516, 524 [174 Cal. Rptr. 116]. Even when discovery of private information is found to be directly relevant to issues in an ongoing civil litigation, discovery cannot automatically be allowed. *Board of Trustees*, 119 Cal. App. 3d at 525. There must be a careful balancing of "compelling public need" for discovery against the "fundamental right of privacy." *City of Santa Barbara v. Adamson* (1980) 27 Cal. 3d 123, 130 [164 Cal. Rptr. 539]; *Board of Trustees*, 119 Cal. App. 3d at 525. Even where discovery of otherwise protected information is ultimately permitted, disclosure of the information must be as narrowly tailored as possible. *Britt v. Superior Court*, (1978) 20 Cal. 3d 844, 864-65 [143 Cal. Rptr. 695] ("[D]isclosure can be compelled only with respect to those mental conditions the patient-litigant has '[d]isclosed . . . by

bringing an action in which they are in issue' [citation]; communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged." (quoting *Lifschutz*, 2 Cal. 3d at 435; *Roberts*, 9 Cal. 3d at 337-39).

The constitutional rights which Petitioners are attempting to vindicate are co-extensive and actually broader than the statutory psychotherapist-patient privilege.

> [T]he statutory privilege and the constitutional privacy right are both interrelated and separate. The psychotherapist-patient privilege is one aspect of the right of privacy, but it and any exceptions are subject to constitutional standards. Because resolution of the issue regarding privilege in favor of real party would not necessarily be dispositive of the issue of privacy, we shall first address the broader privacy issue. In so doing, we conclude that the court's order of disclosure violated petitioner's right of privacy.

Davis, 7 Cal. App. 4th at 1013 (citations omitted; citing *Lifschutz*, *supra*; *Heda v. Superior Court* (1990) 225 Cal. App. 3d 525, 528 n. 1 [275 Cal. Rptr. 136]; *Cutter v. Brownbridge* (1986) 183 Cal. App. 3d 836, 845-46 [228 Cal. Rptr. 545]). Thus, the constitutional right of privacy is held to apply even if the statutory privilege does not protect the

subject matters at issue. *Davis*, 7 Cal. App. 4th at 1014 (citing *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal. 3d 652, 656 [125 Cal. Rptr. 553]).

In *Davis*, the defendant sought, among other things, plaintiff's psychotherapist records in her personal injury action stemming from an automobile accident. The *Davis* plaintiff had expressly limited her claim for emotional distress damages to "pain and suffering" associated with her physical injuries. The *Davis* defendant, like Defendants in this case, argued that the plaintiff had failed to establish the basis for her assertion of a statutory psychotherapist-patient privilege. The Fifth District Court of Appeal rejected the argument, holding that any defect with respect to the statutory privilege did not bar the application of the "much broader zone of privacy." *Davis*, 7 Cal. App. 4th at 1020 (citing *Mahoney v. Superior Court* (1983) 142 Cal. App. 3d 937, 940 [191 Cal. Rptr. 425]). Thus, the *Davis* court reversed (upon that plaintiff's petition for a writ of mandate) the trial court's order requiring production of such psychotherapist records as violating that plaintiff's constitutional rights of privacy. *Davis*, 7 Cal. App. 4th at 1020.[3/]

Fishburne's constitutional right of privacy precludes discovery of his psychotherapy diary independently

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3. The *Davis* court also found that, like Defendants in this case, there had been no showing of direct relevance of sought records to the issues in that litigation: "[R]ather, real party only speculates that in the records requested there could be material which might be relevant to various issues in the action, such as the nature and extent of emotional distress suffered, causation of the accident and petitioner's condition at the time of the accident. *Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issues does not suffice.*" *Davis*, 7 Cal. App. 4th at 1017 (emphasis added).

from the operation of the psychotherapist-patient privilege. Fishburne's right of privacy governs the entirety of his psychotherapist-patient relationship -- including the psychotherapy diary he created and maintained in connection with his treatment. The Superior Court's order requiring Fishburne to produce that diary in its entirety to the discovery referee violates Fishburne's constitutional right of privacy -- particularly since the Superior Court recognized that "98 or 99 percent" of the diary cannot possibly be relevant. Moreover, the Superior Court failed to conduct any balancing of rights which took into account Fishburne's fundamental privacy rights over his psychotherapist-patient relationship. Like *Davis*, Fishburne's constitutional rights cannot take a back seat to such speculation. This Court must grant review of these orders so that patients' fundamental rights pertaining to their relationships with mental health professionals throughout California are not unduly infringed by the discovery process in civil litigation.

B. The Superior Court's Order Violates The Statutory Psychotherapist-Patient Privilege Under The Evidence Code

It is well established in California that the psychotherapist-patient relationship is afforded a privilege precluding the disclosure of confidential communications arising during the course of that relationship. *Lifschutz*, 2 Cal. 3d at 431-32; *Cutter,* 183 Cal. App. 3d at 843.

In this case, there is no dispute that the diary at issue was created and maintained at the specific direction of Fishburne's psychotherapist for purposes of facilitating their communications during Fishburne's psychotherapy sessions. The discovery referee expressly found that Petitioners established their *prima facie* burden to show that the statutory evidentiary privilege applied to these communications. The Superior Court further found that "98 to 99 percent" of the materials in the diary would have nothing to do with this lawsuit. (September 14, 1995 transcript, App. at 4, Exh. 24 at 0464). Nevertheless, the Superior Court ordered Fishburne to produce his entire diary so that the discovery referee could "isolate" potentially relevant entries. (September 14, 1995 transcript, App. at 4-5, Exh. 24 at 0464-0465). There can be no question that the Superior Court's order effectively obliterates Fishburne's

privilege a clear abuse of the Superior Court's discretion.[4] This Court must issue the requested stay and writ.

C. The Superior Court's Order Compelling An *In Camera* Inspection Is A Significant Intrusion Into The Psychotherapist-Patient Relationship In Violation Of The Constitutional Right Of Privacy And The Psychotherapist-Patient Privilege

Section 915 of the California Evidence Code illustrates strong California policies which recognize that even an *in camera* review of privileged and constitutionally protected materials is a substantial invasion of rights. As numerous courts have recognized, *in camera* inspection of psychological records is not generally permitted because of the substantial and irreparable invasion upon a patient's relationship with his psychotherapist. *See Grosslight v. Superior Court* (1977) 72 Cal. App. 3d 502, 504 [140 Cal. Rptr. 278] (*in camera* review of psychological records not permitted under Section 915); *Carlton v. Superior Court* (1968) 261 Cal. App. 2d 282, 292-93 [67 Cal. Rptr. 568] (*in camera* review of hospital records not permitted under

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4. The Superior Court was apparently persuaded (incorrectly) that Petitioners' claim for damages ("a big chunk of money") was sufficient to intrude upon Fishburne's private and incontrovertibly *privileged* affairs. (September 14, 1995 transcript at 5; App. Exh. 24 at 0465).

Section 915). In any event, any compelled production of such highly private material must be narrowly tailored to provide the legitimate discovery objective without unwarranted intrusion into fundamental constitutional rights. *Britt*, 20 Cal. 3d at 859; *Roberts*, 9 Cal. 3d at 337.

In this case, the Superior Court's order cannot possibly be narrowly tailored to minimize the intrusion into Fishburne's constitutional rights. For example, the Superior Court rejected alternate methods to discover the only purportedly relevant "fact" possibly contained in the psychotherapy diary -- i.e. notice to Fishburne of "[w]hether Mr. Fishburne got the part" and any other entries "relating to the movie." (September 14, 1995 transcript at 1 & 4; App. at 0461 & 64).[5]

More importantly, the Superior Court rejected Petitioners' request to produce only the entry or entries relating to the Movie to the discovery referee for his review. Thus, the Superior Court ordered Petitioners to provide all of Fishburne's psychotherapy diary to the discovery referee so that he can "isolate" -- after reviewing all of Fishburne's private thoughts and communications with his psychotherapist -- the potentially relevant entries to which he would make additional redactions. (September 14, 1995 transcript, App. at 4-5, Exh. 24 at 0464-0465).

Thus, Section 915 and the foregoing cases recognize that any compelled production of psychotherapist-patient information, even if only *in camera*, is a substantial intrusion into Fishburne's rights. Defendants do not (and

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5. Indeed, Defendants have never been precluded from discovering these facts and asked many questions of Petitioners' witnesses about these issues.

cannot) provide any authority which permits any compelled *in camera* review of materials protected by the psychotherapist-patient privilege or the constitutional right of privacy governing the psychotherapist-patient relationship. The Superior Court itself recognized that "98 to 99 percent of the material" ordered produced to the discovery referee cannot possibly be relevant.

Finally, it is clear that an entire class of people, including Fishburne are presently risking their constitutional rights of privacy and their statutory privileges by confiding in their psychotherapists their most private thoughts. As the federal courts have widely recognized,

> The psychiatric patient . . . exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say -- and all that the psychiatrist learns from what they say -- may be revealed to the whole world from a witness stand.

Jaffee v. Redmond (7th Cir. 1995) 51 F.3d 1346, 1356.[6/] Without further direction from this Court solidifying the narrow parameters within which information arising out of protected by the psychotherapist-patient relationship must be disclosed, multitudes of patients may be forced to chose between sacrificing their fundamental rights of privacy and seeking desperately needed psychotherapy. This Court must grant review of these important issues affecting psychotherapists and their patients throughout California.

CONCLUSION

For all the foregoing reasons, therefore, Petitioners Laurence Fishburne and The LOA Productions, Inc. respectfully request that this Court immediately grant an emergency and immediate stay of the order of the Superior Court of the State of California for the County of Los Angeles dated September 14, 1995 (clarifying its August 10, 1995 order) pending its review of this petition raising compelling and unresolved issues relating to the scope of the constitutional right of privacy as it relates to the

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6. The United States Supreme Court recently recognized the importance of the laws protecting the psychotherapist-patient relationship in granting certiorari to review the Seventh Circuit's holding in the *Jaffee* action. *Carrie Jaffee, Special Administrator for Ricky Allen Sr. v. Marylu Redmond*, —— S. Ct. ——, 1995 WL 500561, 64 USLW 3281, 64 USLW 3285 (U.S., Oct. 16, 1995) (No. 95-266)

psychotherapist-patient relationship as well as the scope of the psychotherapist-patient privilege under the Evidence Code.

DATED: November 8, 1995

Andrew M. White
Melvin N.A. Avanzado
David E. Fink
CHRISTENSEN, WHITE, MILLER, FINK, JACOBS, GLASER & SHAPIRO

By_____

Melvin N.A. Avanzado
Attorneys for Plaintiffs and Petitioners
LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC.

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California and United States Constitutions and the statutory psychotherapist-patient privilege under the California Evidence Code preclude a Superior Court from compelling -- without conducting a hearing regarding the relevance of the contents of that diary or journal -- even an *in camera* production of a patient's diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship. 14

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PROOF OF SERVICE BY HAND DELIVERY
(To be executed by secretary)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action My business address is that of Christensen, White, Miller, Fink, Jacobs, Glaser & Shapiro as set forth on the first page of the document to which this Proof is attached.

I served the below listed document(s) described as: PETITION FOR REVIEW on November 8, 1995, on all other parties to this action by placing a ☒ true copy ☐ original of the above document enclosed in a sealed envelope addressed as follows:

See Attachment to Proof of Service

I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on November 8, 1995 at Los Angeles, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Monica Metoyer _____

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ATTACHMENT TO PROOF OF SERVICE

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90013-1213

The Honorable Leonard S. Wolf
Judge of the Superior Court (Retired)
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Discovery Referee
(By Mail)

No. _____

IN THE

SUPREME COURT OF CALIFORNIA

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC., a New York corporation,

Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES (The Honorable Alan B. Haber) Case No. SC 031 787,

Respondent.

EMERGENCY AND IMMEDIATE STAY REQUESTED PENDING DECISION ON THIS PETITION

CINERGI PRODUCTIONS, INC., a California corporation,
CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation,
ANDREW G. VAJNA and RANDOLPH M. PAUL,

Defendants and Real Parties In Interest.

After An Order Summarily Denying A Petition For Writ Of Mandate
Entered By The Court of Appeal, Second Appellate District, Division Two
Second Civil Case No. B 096 113

APPLICATION FOR RECONSIDERATION OF DENIAL OF PETITION FOR REVIEW

CHRISTENSEN, WHITE, MILLER,
FINK, JACOBS, GLASER & SHAPIRO
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IN THE
SUPREME COURT OF CALIFORNIA

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC., a New York corporation,

Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES (The Honorable Alan B. Haber) Case No. SC 031 787,

Respondent.

CINERGI PRODUCTIONS, INC., a California corporation, CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation, ANDREW G. VAJNA and RANDOLPH M. PAUL,

Defendants and Real Parties In Interest.

App. 118

After An Order Summarily Denying A Petition For Writ Of Mandate
Entered By The Court of Appeal, Second Appellate District, Division Two
Second Civil Case No. B 096 113

APPLICATION FOR RECONSIDERATION OF DENIAL OF PETITION FOR REVIEW

INTRODUCTION AND SUMMARY

Plaintiffs Laurence Fishburne and The LOA Productions Inc. (collectively "Petitioners") submit this application for reconsideration of this Court's denial of their petition for review. Petitioners filed their petition for review on November 8, 1995. This Court denied review by order dated November 15, 1995, with Justices Mosk, George and Werdegar of the opinion that Petitioners' petition should be granted. That same day, Dr. Saul J. Faerstein, M.D., Chairman of the Judicial Action Committee of the Southern California Psychiatric Society submitted an *amicus* letter highlighting the importance of the issues raised by Petitioners' petition. (Tab A). Petitioners ask the Court to reconsider their petition in light of Dr. Faerstein's letter.

Dr. Faerstein's *amicus* letter illustrates the importance of the fundamental right to privacy in the psychotherapist-patient relationship to thousands of psychotherapy patients throughout the state. Absent

consideration from the California Supreme Court, the lower court order compelling production of Fishburne's entire psychotherapy diary will have an undesirable chilling effect on the willingness of psychotherapists to utilize patient psychotherapy diaries as a method of treatment for psychological ailments. Without guidance from this Court, thousands of psychotherapists may refrain from use of this common psychotherapeutic aid due to fears that the confidentiality of the contents of psychotherapy diaries cannot be protected.

Accordingly, Petitioners request that the Court reconsider its denial of their petition for review. Petitioners will not repeat their arguments stated in their petition but attach a copy of that petition (Tab B) for the Court's convenience.

LEGAL DISCUSSION

Petitioners are entitled to move for reconsideration of their petition for review "upon new or different facts, circumstances, or law, and to make application to the same judge or court that made the order, to reconsider the matter and modify, amend or revoke the prior order." Cal. Civ. Proc. Code § 1008.

In its initial denial of Petitioners' petition for review, this Court did not have the benefit of Dr. Faerstein's *amicus* letter which was submitted for consideration on the day of this Court's order denying review. That letter illustrates from the psychotherapists' perspective the fundamental importance of the issues raised by Petitioners and the need for this Court's review of these issues. The issues to be addressed by the Court are fully set forth in

Petitioners' petition for review and are summarized below in light of Dr. Faerstein's letter.

ISSUE NO. 1: Whether the right of privacy guaranteed to all persons under the California and United States Constitutions precludes the Superior Court from compelling production of a patient's entire diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

This Court recognized that the statutory privilege afforded to the psychotherapist-patient relationship is also based on rights guaranteed to all persons by the United States Constitution. *In re Lifschutz* (1970) 2 Cal. 3d 415, 431-32 [85 Cal. Rptr. 829] (psychotherapy comes within "zones of privacy" guaranteed by the Bill of Rights) (citing *Griswold v. Connecticut* (1965) 381 U.S. 479, 484 [85 S. Ct. 1678]). Accordingly,

> because of the potential encroachment upon constitutionally protected rights of privacy by the compelled disclosure of confidential communications between a patient and his psychotherapist, trial courts should carefully control compelled disclosures in this area. Thus, *the psychotherapist-patient privilege is to be liberally*

> *construed in favor of the patient.*

Roberts v. Superior Court (1973) 9 Cal. 3d 330, 337 [107 Cal. Rptr. 309] (citations omitted; emphasis added; citing *Lifschutz*, 2 Cal. 3d at 423, 431-32).

Only one case in the Courts of Appeal has specifically recognized the relationship between the constitutional right of privacy and the statutory privilege protecting psychotherapist-patient communications. *Davis v. Superior Court* (1992) 7 Cal. App. 4th 1008 [9 Cal. Rptr. 2d 331]. In *Davis*, the Fifth District Court of Appeal granted a petition for writ of mandate when a Superior Court order infringed upon the constitutional right of privacy even though the statutory psychotherapist-patient privilege did not apply. *Davis*, 7 Cal. App. 4th at 1020.

This case presents the Court with the opportunity to elaborate on its holdings in *Lifschutz* and *Roberts* to make clear that the constitutional right of privacy also protects the psychotherapist-patient relationship regardless of the application of the statutory protections provided by the Evidence Code. As explained in Dr. Faerstein's letter, guidance by the Court regarding patients' constitutional rights governing their relationship with their psychotherapist is critical -- particularly when, as here, a diary or journal which is communicated only to the psychotherapist is subjected to civil discovery procedures. This Court must provide some guidance to psychotherapists in California on these issues.

ISSUE NO. 2: Whether the psychotherapist-patient privilege under section 1014 of the California Evidence Code precludes the Superior Court from compelling the production of a patient's entire diary

or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

Section 1014 of the California Evidence Code expressly provides that a patient has a privilege to refuse to disclose, and to prevent others from disclosing, a confidential communication between him and his psychotherapist. A confidential communication for purposes of the privilege means information transmitted between patient and psychotherapist in the course of that relationship and in confidence by a means which, as far as the patient knows, discloses the information to no third persons. *County of Alameda v. Superior Court* (1987) 194 Cal. App. 3d 254, 258 [239 Cal. Rptr. 400] (quoting Cal. Evid. Code § 1012). Although this Court's holding in *Roberts* directs courts to construe liberally the psychotherapist-patient privilege, Petitioners have found no cases which address whether the confidential communications" sought to be protected under the statutory privilege must have been actually communicated between psychotherapist and patient.

This case presents the Court with an opportunity to determine whether the psychotherapist-patient privilege is limited or is not limited to actual communications between a psychotherapist and his or her patient. Dr. Faerstein's letter makes clear the psychotherapists' need to have firm guidelines from this Court so that they will be able to treat their patients effectively, without compromising their constitutional rights of privacy.

ISSUE NO. 3: Whether the fundamental protections afforded by the right of privacy guaranteed to all persons under the California and United States Constitutions and the statutory psychotherapist-patient privilege under the California Evidence Code preclude a Superior Court from compelling -- without conducting a hearing regarding the relevance of the contents of that diary or journal -- even an *in camera* production of a patient's diary or journal created at the direction of a psychotherapist and maintained in confidence during the course of the psychotherapist-patient relationship.

This Court's decisions in *Lifschutz* and *Roberts* held that the fundamental rights of all persons and the importance of the psychotherapist-patient relationship to modern society compel all courts to carefully scrutinize requested discovery of matters within the psychotherapist-patient relationship. In conjunction with the statutory privilege under Section 1014 of the Evidence Code, courts have consistently reviewed attempts to discover facts pertaining to the psychotherapist-patient relationship to strike a balance between legitimate discovery needs and the societal interest in protecting persons' fundamental rights. *See, e.g., Davis*, 7 Cal. App. 4th at 1014.

While courts have reviewed many instances where patient records of a psychotherapist are sought or communications between patient and psychotherapist were the subject of discovery inquiries, Petitioners have found no cases which compel an *in camera* production of documents created within the course of a psychotherapist-patient relationship even when those documents admittedly had little (if any) relevance to the pending litigation. Moreover,

Petitioners have found no cases which pertain to documents created by a patient at the direction of his psychotherapist and in furtherance of his counseling sessions but which may have not been communicated with his psychotherapist.[7]

This case presents this Court with the opportunity to determine whether the constitutional right of privacy or the statutory psychotherapist-patient privilege (or both operating in concert) preclude discovery of materials (whether *in camera* or to the parties) created by the patient at his psychotherapist's direction for the purposes of facilitating or in furtherance of their counseling sessions but which may not have been actually communicated between the patient and psychotherapist. As stated in Dr. Faerstein's letter, confidentiality is a key ingredient in effective treatment of patients who place their trust in their psychotherapists in revealing their innermost thoughts and feelings in search of mental health. Without further guidance from this Court, psychotherapists like Dr. Faerstein risk the trust of their patients because they cannot determine from the current state of the law the extent to which diaries and journals created and maintained in the confidential psychotherapist-patient relationship will later be subject to civil discovery disclosures.

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7. Plaintiffs assume for purposes of these poroceedings that the one potentially relevant entry in question about the Movie was not actually communicated to Fishburne's psychotherapist.

CONCLUSION

For all the foregoing reasons, therefore, Petitioners Laurence Fishburne and The LOA Productions, Inc. respectfully request that this Court reconsider its initial denial of their petition for review and immediately grant an emergency and immediate stay of the order of the Superior Court of the State of California for the County of Los Angeles dated September 14, 1995 (clarifying its August 10, 1995 order) pending its review of this petition raising compelling and unresolved issues relating to the scope of the constitutional right of privacy as it relates to the psychotherapist-patient relationship as well as the scope of the psychotherapist-patient privilege under the Evidence Code.

DATED: November 27, 1995

Andrew M. White
Melvin N.A. Avanzado
David E. Fink
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DIPLOMATE, THE AMERICAN BOARD
OF PSYCHIATRY AND NEUROLOGY

November 15, 1995

Via Federal Express

California Supreme Court
303 2nd Street
South Tower
Room 8023
San Francisco, California 94107

Attention: Robert F. Wandruff

Re: *Fishburne v. Cinergi Productions, Inc.*
Los Angeles County Superior Court Case No. SC 031 787
Court of Appeal Second Civil No. B 096 113
Supreme Court Case No. S049930

To the Honorable Justices of the Supreme Court:

California Supreme Court
Re: *Fishburne v. Cinergi Productions, Inc.*

I am a physician and psychiatrist and have been practicing psychiatry since 1972. I also have advanced training in psychiatry and the law by completion of a fellowship at the University of Southern California and have been practicing in this subspecialty since 1975. I am currently an Assistant Clinical Professor of Psychiatry at U.C.L.A. School of Medicine where I teach psychiatry and forensic psychiatry to medical students, psychiatric residents and fellows in forensic psychiatry. I have both a clinical practice (evaluating and treating patients) and a forensic practice (legal consultations) which gives me a unique perspective of the legal problems in the practice of psychiatry and psychotherapy. Over the past twenty years I have conducted several thousand evaluations in both the criminal and civil areas of the law and have treated hundreds of patients in psychotherapy. I have appended my curriculum vitae to this letter and would direct your attention to my special interest in and extensive work with ethics committees, government affairs, the committee on psychiatry and the law, and judicial action.

In my capacity as Chairman of the Judicial Action Committee of the Southern California Psychiatric Society I was asked by Mr. Melvin Avanzado of Christensen, White, Miller, Fink, Jacobs, Glaser and Shapiro to review documents and materials in the above-captioned case to consider how the confidentiality issues in this case would impact on the psychotherapist-patient relationship and the practice of psychotherapy. Accordingly, I write this letter

on behalf of the Judicial Action Committee of the Southern California Psychiatric Society.

The materials at issue in this case are contained in the diary or journal that Mr. Fishburne was asked to keep as part of his psychotherapy. It is an accepted practice in psychotherapy to have a patient keep a diary or journal to assist the patient's memory and to help in the organization of the material presented to the therapist. Patients may be asked to keep such a journal, write notes of random thoughts or write down dreams to be discussed in sessions. When these diaries and notes are shared only with the psychotherapist, and no other third persons, the patient would expect that such materials are as confidential as the actual thoughts and feelings that are discussed in the sessions with the therapist. The confidential nature of the content of these materials would be as sensitive and private and as any notes the therapist might make about the same materials during or following the sessions in which these issues are discussed.

The very existence of a psychotherapist-patient privilege as distinct from the doctor-patient privilege bespeaks the importance of this issue and the unique nature of the relationship a patient shares with a psychotherapist. The additional protections granted this relationship were deemed necessary because of the value society assigns to psychotherapy apart from other medical treatments. Society benefits from individuals being able to maintain the privacy of thoughts and communications in the psychotherapeutic

relationship with the treating therapist. It is well established in medicine and in psychiatry, and consistently recognized by courts, that this relationship must be protected. Revealing patients' confidences and the material patients bring confidentially to the therapy would certainly discourage patients from seeking therapy. The resulting harm to society would clearly outweigh any benefit gained through disclosure. The exceptions to the privilege, by statute and in prior cases, were made for emergencies and rare cases where society would benefit more from the exception than the rule. It is difficult to see where society has such a strong interest in overturning Mr. Fishburne's privacy rights in this case.

The historical development of a narrower privilege protecting the psychotherapeutic relationship was based on well recognized principles elaborated by Wigmore. Privileges should be recognized when 1) the communication sought to be protected was made with the expectation of confidentiality; 2) confidentiality is essential to the relationship in which disclosure took place; 3) the relationship is one that society should seek to foster, and 4) the harm to the relationship caused by disclosure is greater than the benefit to the litigation process. These same principles can be used to weigh and consider whether the disclosure of the Fishburne diary is of such import to society that all the benefits to society represented by the maintenance of confidentiality of these materials should be set aside.

California Supreme Court
Re: *Fishburne v. Cinergi Productions, Inc.*

Because of the importance of these issues and the significance of the doctrines underlying the privilege, a hearing by the Court and review and clarification of the law in this case would be most valuable. Thank you for your consideration. Please feel free to contact me if I can be of further assistance.

Very truly yours,

Saul J. Faerstein, M.D.

SJF/hs
Enclosure
cc Clerk of the Court of Appeal of the State of California
The Honorable Alan B. Haber
The Honorable Leonard S Wolf
Howard L Horwitz. Esq.
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DIPLOMATE, THE AMERICAN BOARD
OF PSYCHIATRY AND NEUROLOGY

CURRICULUM VITAE

BIOGRAPHICAL DATA:

Date of Birth:	November 17, 1943, New York, N.Y.
Marital Status:	Married, 2 children
Citizenship:	United States
Social Security No.:	117-32-9537
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PROFESSIONAL ACTIVITIES:

1. Private practice of general psychiatry and forensic psychiatry, Beverly Hills, California

2. Consultant to courts and court psychiatric panels, including United States District Court Los

Angeles Superior and Municipal Court Other California courts

3. Consultant to private and public attorneys in psychiatric-legal aspects of criminal law, labor law, personal injury, workers' compensation, malpractice, wrongful discharge, and the psychiatric consequences of harassment and discrimination in the workplace

4. Teaching of psychiatry and the law: Assistant Clinical Professor of Psychiatry, UCLA School of Medicine

5. Attending Physician: UCLA Medical Center Cedars-Sinai Medical Center

6. Consultant, California State Bar, on issues of mental competency to practice law

FORMER POSITIONS:

1. Assistant Director, USC Institute of Psychiatry and Law, under Seymour Pollack, M.D.
2. Psychiatric Panel, Los Angeles Superior Court
3. Qualified Medical Examiner, Independent Medical Examiner, California Workers' Compensation Appeals Board/ Division of Industrial Accidents
4. Consulting Psychiatrist, California State Parole Outpatient Clinic

5. Consulting Psychiatrist, Juvenile Division, Los Angeles County Probation Department

ACADEMIC APPOINTMENTS:

1. Assistant Clinical Professor of Psychiatry, UCLA School of Medicine
2. Assistant Clinical Professor of Psychiatry, USC School of Medicine, 1978-1981
3. Instructor and Assistant Professor of Psychiatry, USC School of Medicine, 1975-1978

PROFESSIONAL COMMITTEES AND APPOINTMENTS:

1. Judicial Action Committee, Southern California Psychiatric Society, Chair (current)
2. Ethics Committee, Southern California Psychiatric Society (current)
3. Ethics Committee, American Academy of Psychiatry and the Law (current)
4. Bioethics Committee, Cedars-Sinai Medical Center (current)
5. Private Practice/Managed Care Committee, Southern California Psychiatric Society, Chair, 1992-1994
6. Psychiatric Advisory Committee, Cedars-Sinai Medical Center
7. Committee on Psychiatry and the Law, Southern California Psychiatric Society, (past chairman)

8. Government Affairs Committee, Southern California Psychiatric Society
9. California Attorney General's Ad Hoc Committee on Child Abuse
10. Outpatient Advisory Committee, Cedars-Sinai Medical Center
11. Program Committee, Cedars-Sinai Medical Center, Department of Psychiatry
12. Emergency Room Advisory Committee, Cedars-Sinai Medical Center

SAUL J. FAERSTEIN, M.D.

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Competency to Stand Trial
Determination of Sanity
Diminished Capacity

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Probation and Parole Evaluations
Substance Abuse Issues

Civil-Legal Issues
Medical Malpractice
Disability Evaluation
Wrongful Discharge
Sexual Harassment in the Workplace
Race and Sex Discrimination
Personal Injury and Psychic Trauma
Emotional Distress and Injury
Testamentary Capacity
Competency to Contract
Workers' Compensation
Civil Commitment
Tarasoff Issues and Evaluation of Danger

Expertise and Experience

I have consulted in more than two thousand criminal and civil cases in the capacity of forensic psychiatric expert. I have testified hundreds of times as an expert witness and been qualified by all major courts as an expert in psychiatry. References and fees are available upon request.

SAUL J. FAERSTEIN, M.D.

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Supreme Court, U.S.
FILED
MAR 11 1996
CLERK

No. 95-1262

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC.,

Petitioners,

v.

CINERGI PICTURES ENTERTAINMENT INC., ANDREW G. VAJNA and RANDOLPH M. PAUL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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46 pp

PARTIES BELOW

Respondents respectfully disagree with Petitioners' characterization of the parties to this action in two respects. First, Petitioners assert that Cinergi Productions, Inc., a California corporation, is a party. In fact, there is no such entity. Second, Petitioners fail to include as a party with an interest in the outcome of this litigation Cinergi Productions Inc. (California), which was recently added by Petitioners as a defendant in the trial court proceeding.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Cinergi Pictures Entertainment Inc., Andrew G. Vajna and Randolph M. Paul (collectively "Respondents") hereby respond to the Petition for Writ of Certiorari (the "Petition") filed by Petitioners Laurence Fishburne and The LOA Productions, Inc. (collectively "Petitioners"). Respondents respectfully request that this Court deny the Petition.

Review by this Court is unnecessary and inappropriate because (1) the issue raised by the Petition is now moot, (2) the issue before this Court in *Jaffee v. Redmond*, 51 F.3d 1346, 1356 (7th Cir. 1995), *cert. granted*, 116 S.Ct. 334 (Oct. 16, 1995) (No. 95-266), is irrelevant to this action, and (3) there is no issue in this case as to the constitutional right of privacy.

I. The Sole Issue Raised By The Petition Is Moot.

The Petition challenges the trial court's order[1] compelling Petitioners to deliver Petitioner Fishburne's entire diary to the discovery referee for *in camera* inspection when, according to Petitioners, at most only one entry is relevant to the lawsuit.[2] However, Petitioners have recently

---

1 Both the California Court of Appeal and the California Supreme Court declined to disturb the ruling of the trial court.

2 Petitioners' assertion that there is only one relevant passage in the diary is unsupported by the record. In addition to refusing to produce the diary, Petitioners in fact have also consistently refused

(continued...)

represented that they will produce substantially more than the one diary entry they claim to be relevant, if not all of the diary, to the discovery referee for *in camera* inspection. Indeed, they have already so produced a copy of a portion of the diary.

Petitioners, on February 13, 1996, confirmed to the trial court at a recent hearing that "we have provided the one entry that your Honor's order was about." (App. 7.) Petitioners' counsel went on to state at the same hearing:

> "But in order to protect our trial date, at great cost and at great deliberation, we have elected to comply with the order, produce to [discovery referee, Retired] Judge Wolf -- we already produced the one entry and now produce to Judge Wolf the entirety of the diary during the period of the parties' negotiations for him to confirm that the one entry we've already given is the only entry. And we have -- I have the diary in my office. I'm prepared to give it to Judge Wolf immediately. That would be complete compliance..." App. 9.

Petitioners also represented at the hearing that "we're willing to produce the diary in toto to Judge Wolf." (App. 21.)

Following the above hearing, Petitioners further represented that they will produce the diary "in toto" to the discovery referee for *in camera* inspection. In a letter dated February 16, 1996, Petitioner's Counsel of Record wrote the discovery referee in pertinent part as follows:

"As you know we previously provided to Your

2(...continued)
even to state whether other diary entries responsive to Respondents' discovery, such as, for example, on the issue of mitigation of damages, even exist. *See, e.g.*, App. 15-17, 19.

Honor ... the diary entry dated May 10, 1995...
"We are prepared to provide Your Honor with Mr. Fishburne's psychotherapy diary, for your in camera review, at your earliest convenience....We respectfully request that you please contact the undersigned, as soon as you are able to schedule an in camera review, consistent with Judge Haber's order." App. 32.

The above letter constitutes a further representation by Petitioners that they will comply with the trial court order that is the subject of the Petition by delivering the entire diary to the discovery referee for *in camera* inspection, and they have already provided to the discovery referee for *in camera* inspection a copy of a portion of the diary. Petitioners have therefore committed to producing for inspection substantially more than the single diary entry they assert is relevant, leaving as the only possible remaining issue how much more of the diary must be inspected by the discovery referee to comply fully with the trial court's order. The Petition is therefore moot because much more than the one supposedly relevant entry is going to be produced for inspection in any event.

As this Court has noted, "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy...and a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975), quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Mootness has been found where a subpoena directed to a third party was challenged, but the third party returned documents to the

subpoenaing party prior to resolution of the challenge. *Harris v. Board of Governors of Federal Reserve System*, 938 F.2d 720 (7th Cir. 1991). *See also North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (habeas corpus proceeding moot where respondent had already been discharged from prison).

No determination of this Court regarding the trial court's order that is the subject of the Petition will affect rights of the litigants in this proceeding because Petitioners have represented they will imminently permit an *in camera* inspection of much more of the diary than the one entry they claim is relevant, if not the entire diary. The fact that the *in camera* inspection has not yet occurred is irrelevant to the mootness of the Petition as Petitioners have represented that they shall so produce the diary. It is thus "the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision [on mootness]." *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (representation of respondents that student who challenged school admissions policies as discriminatory would be permitted to remain in school regardless of outcome of case adopted by Court in finding student's claim to be moot).

II. The Issue Before This Court In *Jaffee v. Redmond* Has Nothing To Do With Any Issue In This Case.

Petitioners assert that because there is a split among the circuits as to the existence and scope of a federal psychotherapist-patient privilege which this Court agreed to address in *Jaffee v. Redmond*, 51 F.3d 1346, 1356 (7th Cir. 1995), *cert. granted*, 116 S.Ct. 334 (Oct. 16, 1995) (No. 95-

266), the instant Petition presents an issue which this Court has already found to be of great import. In point of fact, *Jaffee* is entirely irrelevant to the instant case because there is no such split as to the existence or meaning of California's statutory psychotherapist-patient privilege (California Evidence Code § 1010, *et. seq.*), which is applicable to this California case. The split among the circuits is therefore on an issue -- the existence and scope of a federal privilege -- that has no bearing on this case.

The issue before this Court in *Jaffee* is, "Should this court resolve conflict between federal courts of appeal about existence of psychotherapist privilege under Rule 501" and, assuming such a privilege is recognized, to which mental health care providers should it extend? *Jaffee v. Redmond, supra,* 64 U.S.L.W. 3281 (U.S. Oct. 17, 1995) (No. 95-266). The instant case, by contrast, is a state (California) case governed by California law, which has a statutory scheme (California Evidence Code § 1010, *et. seq.*) establishing a psychotherapist-patient privilege. Whether there is a federal psychotherapist-patient privilege under Rule 501 and, if so, its scope -- the issue in *Jaffee* -- therefore has no relevance to this case.

Here, the state trial court made the factual determination that the subject diary entries were not protected from discovery by California's statutory psychotherapist-patient privilege because they did not constitute a "communication" between patient and psychotherapist as required by California Evidence Code § 1012. Petitioners' counsel concedes, and the trial court has confirmed, that the trial court then weighed and balanced the parties' respective interests, finding that Petitioners' constitutional privacy interest in the diary was outweighed by

Respondents' need for discovery of portions of the same. (App. 15, 16, 18.) In short, there is no commonality whatsoever between the issue in *Jaffee* and any issue in the instant case.

III. There Is No Issue In This Case As To The Constitutional Right Of Privacy.

Petitioners suggest this case somehow presents an issue as to the existence or scope of the constitutional right of privacy. That is incorrect. Petitioners, who argue that a constitutional right of privacy exists and is applicable to Petitioner Fishburne's diary, concede that the trial court determined that Petitioner Fishburne's constitutional privacy interest in the diary was outweighed by Respondents' need for discovery of certain entries in the same. (App. 15, 16.) The trial court has also confirmed that this was the analysis it employed. (App. 18). It is therefore clear the trial court found a constitutional right of privacy to exist; without such a finding it could not have balanced Petitioner Fishburne's right of privacy against Respondents' discovery interests. Petitioners are therefore not in a position to challenge the trial court's finding of a constitutional right of privacy; Petitioners themselves urge this Court to reach the same conclusion.

Even assuming the trial court determined there is no constitutional right of privacy -- the exact opposite of what it actually concluded -- there is no split among the circuits on the issue. No federal circuit court of which Respondents are aware has held that there is no constitutional right of privacy. This case therefore presents no constitutional conflict or issue requiring resolution by this Court.

IV. Conclusion.

For the foregoing reasons, the Petition should be denied forthwith.

Respectfully submitted,
Norman S. Oberstein
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Howard L. Horwitz
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Attorneys for Respondents

APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT WE B JUDGE ALAN B. HABER

LAURENCE FISHBURNE, et al.,) No. SC 031 787
)
Plaintiffs,)
)
vs.)
)
CINERGI PRODUCTIONS, INC.,)
et al.,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
February 13, 1996

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O R I G I N A L

LOS ANGELES, CALIFORNIA; TUESDAY, FEBRUARY 13, 1996

DEPARTMENT WE B JUDGE ALAN B. HABER

APPEARANCES:
Counsel for the Plaintiffs, ANDREW WHITE, Esq., MELVIN N. A. AVANZADO, Esq.;

Counsel for the Defendants, HOWARD L. HORWITZ, Esq.

THE COURT: 45, Fishburne versus Cinergi Productions, et al.

MR. HORWITZ: Good afternoon, your Honor, Howard Horwitz for Defendants.

MR. WHITE: Good afternoon, your Honor, Andrew White and Melvin Avanzado of Christensen, White, Miller, Fink, Jacobs, Glaser and Shapiro on behalf of Plaintiffs.

MR. AVANZADO: We're in the wrong place, your Honor.

MR. HORWITZ: Well I think we're all moving parties here.

THE COURT: You're both moving parties. It's okay--

MR. WHITE: We're both in the wrong place.

THE COURT: I can handle it. You know somehow I feel like I've done something and I'm being punished with this case.

MR. HORWITZ: The case that won't go away.

THE COURT: Someone is trying to make me sorry that I ever ruled the way that I did. Look, I understand it's important to you and I hope you don't interpret that as demeaning your positions, okay, I'm not. It's just that -it's like this is a case that just doesn't -- I'm not talking about your effort. I'm not begrudging your effort for appellate relief. You may remember, or may not remember, I refused to be very strident about enforcing the order knowing that it was a close -- I felt it was a close issue and knowing that you were up seeking appellate remedies. I really don't know what's happened. Did you abandon your petition to the Supreme Court, U.S. Supreme Court?

MR. WHITE: We have not, your Honor. We have petitioned -- and I think we received confirmation today that was placed on the docket last week. Your Honor, the confirmation we got dated the 9th of February is that the case was filed December 12, '95 and placed on the docket on February 8 of '96. It has case number 95-1262.

MR. HORWITZ: Your Honor, what happened is the last time we were here a little over two months ago, counsel came into court and indicated that they were that day filing and serving the petition for writ of cert to the U.S. Supreme Court.

THE COURT: Didn't have the right format.

MR. HORWITZ: Well, when we got back to our offices it was -- the papers were bounced as not complying with the technical requirements and they waited approximately 60 days to resubmit it.

MR. AVANZADO: We didn't waive, your Honor. I mean, it's a difficult thing.

THE COURT: Look, they're the Plaintiff in this lawsuit. If they're not in a hurry to get to trial -- I mean, they may be in a hurry to get to trial, but if they're seeking appellate relief that makes it not feasible to get to trial, that's on them it's not on you.

MR. HORWITZ: Your Honor, that is an issue before you because we in fact have a March 18 trial date, and it's our position that they deliberately waited because this Court indicated it would not sanction them until the appellate remedies were exhausted. So if they could get the matter to trial before that happened then they wouldn't have to deal with the sanctions issue.

THE COURT: Okay, now I understand --

MR. AVANZADO: Your Honor, let me -- if I --

THE COURT: Look, I will hear from you but let me just respond to that before I overlook it. Obviously there's an issue of fairness. You're the moving party on the discovery material.

MR. HORWITZ: Correct.

THE COURT: And you shouldn't -- your client should not be in the position of having to go to trial if you have an entitlement to the material. For example, the Supreme Court declines to get involved -- or gets involved and doesn't see it the Plaintiff's way, my order ought to be complied with. And if it can't be complied with because of their efforts at appellate relief prior to March 18th, what I ought to do right now, given that that's just a little over a month away, is probably continue the trial.

MR. HORWITZ: Your Honor, we made such a motion. The Discovery Referee Judge Wolf has recommended that the Court vacate the trial date.

THE COURT: Yes, I just received his report, his recommendations, but it's rather lengthy. I didn't have a chance to review it. I just saw it for the first time this morning.

MR. HORWITZ: Yes, your Honor.

THE COURT: Is that what he recommended?

MR. HORWITZ: In a nutshell he's recommended that while all of this is going on the trial date be vacated because there are so many unresolved --

THE COURT: We don't vacate trial dates, but if you're talking about a continuance.

MR. HORWITZ: Then a continuance.

MR. AVANZADO: Your Honor, let me address this. The underlying -- the mistake in inference I think the Court is drawing from all of this is that we have not complied with

your order.

THE COURT: Well that is the impression I had. Now keep it in mind --

MR. AVANZADO: We have --

THE COURT: Wait, let me just finish because I think I really need to correct the impression you have. The last time I had anything to do with this, prior to reading this new motions that are before me as I recall, is learning --and I can't recall the form that it took -- that there was some defect procedurally in your application to the Supreme Court.

MR. AVANZADO: Correct.

THE COURT: Not until just now did I learn that you've renewed your effort and you're on the Supreme Court docket. So when I wrote this tentative ruling my assumption was that I hadn't seen anything, or heard anything that you had, for whatever reasons, abandoned, knowing your trial date was March 18th, you just hadn't pursued any further relief before the U.S. Supreme Court. You've correct that impression now, okay.

MR. AVANZADO: Correct. The problem in the formatting is that the Supreme Court requires you to retype everything and we had a problem with the printer on that. That's what took so long.

MR. HOFWITZ: Your Honor, I spoke with the printer yesterday and they represented to me it takes -- they can do it overnight.

MR. AVANZADO: That having been said, you have to submit the appendix as part of your brief and it has to be re-entered into a brief format, and they want us to spend $30,000 on a brief --

MR. HORWITZ: You can scan it, your Honor, and have it done in less than two days.

MR. AVANZADO: Regardless of the issue, all right -- regardless of that issue, what I was addressing in terms of what I believed is a misconception by the Court, is that we have provided the one entry that your Honor's order was about.

THE COURT: But if you haven't --

MR. AVANZADO: We have.

THE COURT: Oh, you have?

MR. AVANZADO: We have provided --

THE COURT: To who?

MR. AVANZADO: To Wolf and he redacted it and he gave it to the Defendants. Now --

THE COURT: Then I misunderstand.

MR. AVANZADO: Now, the only other issue, and I think we addressed it at --

THE COURT: I'll hear from you. Only one at a time though, please.

MR. HORWITZ: Thank you, your Honor.

MR. AVANZADO: The only other issue that really is a problem for us -- we obviously disagreed with your initial order.

THE COURT: No question, I understand.

MR. AVANZADO: We're trying to limit what Judge Wolf looks at and your initial order, which you have confirmed in your tentative, was that what is to be produced is notice of when Fishburne got the part. That was your prior order. Now on page five of the transcript of our first hearing on this, and that's, you know, way back when, I asked you the question, "What portions of the diary am I suppose to give to Judge Wolf?" and your statement to me was, "Let Wolf decide." But Judge Wolf doesn't believe he is capable of making that determination. He thinks that's for you to decide. That's why we're coming forward. And if the issue is what the notice was of Fishburne getting the part, okay, and that has already been provided. The one entry has already been provided to them. The only remaining issue, is what does Judge Wolf look at to insure that we're not being less than forthcoming.

THE COURT: Are you talking about the scope of the journal or the diary?

MR. AVANZADO: Correct.

MR. WHITE: Correct.

THE COURT: The time frame?

MR. AVANZADO: The time frame. - And that's why we

made the motion--

THE COURT: I thought I delineated the time frame at some point.

MR. AVANZADO: You did not, your Honor.

MR. WHITE: We thought it was clear, your Honor. If I could just clarify our position.

THE COURT: Look, I promise you I'll hear from you.

MR. WHITE: Okay, okay. Mr. Horwitz has not quite stated it accurately. We have pursued our remedies before the Supreme Court. But in order to protect our trial date, at great cost and at great deliberation, we have elected to comply with the order, produce to Judge Wolf -- we already produced the one entry and now produce to Judge Wolf the entirety of the diary during the period of the parties' negotiations for him to confirm that the one entry we've already given is the only entry. And we have -- I have the diary in my office. I'm prepared to give it to Judge Wolf immediately. That would be complete compliance and I can assure you because I've reviewed every single word in there myself. There isn't another word in there that falls under the portions of your Honor's order --

THE COURT: I don't know why there's some disagreement. I thought I set forth a time frame.

MR. HORWITZ: No, your Honor.

MR. WHITE: The time frame is clear from the action. It starts in April and goes to June.

THE COURT: Well but there's a dispute over what the appropriate time frame is --

MR. AVANZADO: In terms of what is actually to be produced for the in camera inspection, I don't believe that your Honor's order stated a time frame as to which entries are to be produced. Now, what is to ultimately be produced after redaction by the referee to the Defendants, your Honor was perfectly clear that it was during the notice to Fishburne of when he got the role. But that -- obviously if you take the relevant period, that could only be when the parties were engaged in their discussions.

MR. WHITE: The language in the minute order of September 14, '95, your Honor, is discovery referee to redact everything except "notice of Fishburne to get movie role production, to be within the 20th." But the phrasing -- everything except, "Notice of Fishburne to get movie role," everything else is cut out. That notice occurred in April and it's been produced.

MR. AVANZADO: April or May I think.

MR. WHITE: May, I believe it's May. That's been produced.

THE COURT: And the referee, Judge Wolf, reviewed the entire journal or diary?

MR. HORWITZ: No, your Honor. The diary has never been delivered to him.

MR. AVANZADO: That is the part we're arguing over, what portion of the diary is to be the inspection. We gave him--

THE COURT: You're saying you took out an entry in the diary--

MR. WHITE: We gave them two pages.

MR. HORWITZ: They photocopied it.

COURT: Okay, now I understand.

MR. AVANZADO: We gave them the photocopy of the entry where the notice appeared.

THE COURT: And redacted everything else.

MR. AVANZADO: No, we gave it to them in full, the full entry. And he ordered us to redact.

THE COURT: And that's in April.

MR. AVANZADO: That's April or May.

MR. HORWITZ: It's a May 9 or May 10 entry, your Honor.

THE COURT: All right, your position?

MR. HORWITZ: Your Honor, this is an attempt by Plaintiffs to use this Court's prior order to avoid having to produce what we believe are smoking-gun documents. We're not going to the U.S. Supreme here about the entry that's been produced. It's because, your honor, there are other relevant key entries in that diary and they don't want Judge Wolf either to see it or for this Court to indicate that relevant entries have to be produced.

THE COURT: Well that's an assumption that you make. But, why -

MR. HORWITZ: I agree, your Honor.

THE COURT: Why can't there be a legitimate -- I mean, that's certainly one scenario.

MR. HORWITZ: Yes.

THE COURT: I'm not prepared to accept that any more or less than I would the other scenario that they believe that I have violated Mr. Fishburne's constitutional rights of privacy and want to -- and I don't mean this facetiously and want to teach me a lesson, or want to vindicate their client's rights.

MR. WHITE: More the latter, your Honor.

MR. AVANZADO: More the latter.

THE COURT: No, I'm not -- really, I'm not demeaning you.

MR. HORWITZ: Your Honor, I would have agreed that that was a possibility until Plaintiffs offered to make a portion of the diary available to the discovery referee for examination, but not the portion that would have the key entries. And, your Honor, there must be a presumption here that there are smoking-gun documents because Plaintiffs have refused to identify which entries in the diary fall within our discovery and they've -

THE COURT: I'm not permitted to -- I won't permit myself to draw that conclusion.

MR. HORWITZ: I agree, your Honor. That is why we proposed and Judge Wolf directed us to seek clarification. When he looks at that order he -

THE COURT: Well I can only tell you that I certainly wouldn't have ordered -- I mean, it may seem circular to you -- I certainly wouldn't have required a discovery referee to make the inspection unless I felt it were appropriate to do it. I realize that's self serving. But if I wanted you to decide what is appropriate to be produced, I wouldn't have delegated the responsibility to a referee.

MR. HORWITZ: Your Honor, may I just explain my argument?

THE COURT: Yes.

MR. HORWITZ: Your Honor, Judge Wolf simply wanted to know, and asked us to bring a motion before this Court to confirm, that when he opens up that diary and sees relevant entries that he is to produce them. And Plaintiffs are arguing that this Court has somehow determined that he should not do that. That he should somehow -

THE COURT: Well isn't it possible -- the statement that was made to me earlier this afternoon was, just a few minutes ago, was that Judge Wolf doesn't think that he should do the reviewing he thinks I should do it.

MR. HORWITZ: No.

MR. AVANZADO: I said, your Honor, that he was not -- in the first transcript you said Judge Wolf was to determine which entries of the diary were to be produced to him for inspection based on your order on what was he ultimately

looking for. And Judge wolf didn't believe that he was empowered to determine that, that you had to make the determination whether we had to give him all the diary or only the period of time in which the relevant entries could be--

THE COURT: Right.

MR. HORWITZ: That's not -- I disagree vehemently, your Honor. Judge Wolf has made more than clear he is prepared to follow this Court's order, read the diary, identify the relevant entries and the only request for clarification on his part is what to do when he finds a relevant entry because Plaintiffs contend that this Court has ruled that he should not produce it, which of course is not the case because it has not been before this Court.

MR. WHITE: Your Honor, the Court's order, as you indicated in your tentative, is clear. The referee is to redact everything out except notice of Fishburne to get the movie role.

THE COURT: Right.

MR. WHITE: That's in the minute order of September 14th, very clear. And if that is the Court's order, clearly we can deal with that easily with the referee.

MR. HORWITZ: Your Honor, this Court should not -

MR. WHITE: Mr. Horwitz wants to -

MR. HORWITZ: Let me finish, Counsel.

MR. WHITE: -- expand that. That's the whole issue.

THE COURT: I understand that. I think I understand it, but now I'm concerned.

MR. HORWITZ: Your Honor, there's a problem here. The problem is that Plaintiffs have refused to comply with the code that requires them to identify entries that are responsive to discovery and they've refused to permit the discovery referee to look at the diary to identify which entries may be discoverable and be within our discovery. Any order from this Court that allows them to hide those entries without having to describe them or allow the referee to look at it, just causes gross injustice.

MR. WHITE: Your Honor, the concern that Mr. Horwitz is bumping into is precisely the concern that prompted this order in the first place. This is not a personal diary. It is not even an attorney/client communication. It is a psychotherapy communication. And we presented arguments to the Court that because of that nothing in this diary should be revealed to anybody, not to us, not to the referee and certainly not to them.

MR. HORWITZ: Your Honor, this is --

MR. WHITE: Your Honor balanced that and came up with the order of September 14 that said based on Mr. Fishburne's acknowledgment that there was an entry in there that reflected his receiving notice -- he already disclosed that in his deposition before we knew the diary existed. Your Honor ordered production with respect to that limited area. Your Honor did not say that this entire diary is open for discovery. This is a psychotherapy/patient communication. That is the reason we're here. That is the whole basis for our motion, and your Honor did a balancing. You clarified on September 14 that you did a balancing for the need for

discovery versus Mr. Fishburne's right of privacy with respect to those communications and concluded that with respect to this area discovery was appropriate. We're prepared to permit complete discovery and produce the diary for complete discovery. However, Mr. Horwitz now wants you to rule that this entire diary is devoid of any protection and anything in there that might remotely relate to this lawsuit is subject to production, and that's not the Court's prior order.

MR. AVANZADO: And as to the code, your Honor, we identified the diary itself on a privilege log asserting the psychotherapist/patient privilege. There is no requirement in the code that I take the one book and take every entry and make separate entries for each separate entry in the book. And that's the problem that he's running into. We complied with the code. We did not see the diary, quite frankly, until after all of this transpired and we are prepared to go forward in order to keep our trial date.

MR. HORWITZ: Your Honor, the law is clear that where a party seeks to invoke the psychotherapist/patient privilege it is their burden to produce facts sufficient to invoke the privilege. There has been no evidence submitted to this Court that any of these other entries that may be there either were created as part of a psychotherapist/patient relationship, or as required in People versus cabrol (phonetic), their dominant purpose was to facilitate therapy. Under Plaintiff's argument -

MR. WHITE: That's a false statement, your Honor.

MR. HORWITZ: Let me finish, Counsel. Under Plaintiff's argument, if a therapist tells someone to maintain a diary you can then keep a record of a criminal enterprise and

because your therapist told you to keep it that makes it privilege. That is not the case. If you seek to withhold an entry you must show that the dominant purpose of that entry is to obtain therapy. Your Honor, the problem here is we're arguing in a vacuum. If they were required to identify the entries within our discovery, or the discovery referee was allowed to look at the diary and identify what's relevant, we could then examine this issue of whether the psychotherapist/patient privilege prevents its discovery. But they haven't told us what's there so we can't address it. We don't know the name of the therapist. We don't know when the entries were created. We don't know what the purpose of the entries was. We have no idea what any of it's about. How can we respond to their self serving argument that they're somehow privileged. We're in the dark. It would be a travesty if they were permitted to hide these documents, never identifying them, never explaining how they might be privileged. Judge Wolf is prepared to look at them, and, fine, maybe they don't have to be turned over if this Court doesn't want to permit that, but at least then we can know what we're talking about.

MR. WHITE: Your Honor, the argument that Mr. Horwitz just made is, and he knows it, flatly incorrect. He examined Mr. Fishburne. Mr. Fishburne explained that he maintains this diary because he is frequently geographically on location away from his therapist and at his therapists request he writes down -- in lieu of having an oral session with his therapist, he writes down his thoughts, feelings, et cetera in the journal and provides the journal in toto to his therapist as part of his therapy. For Mr. Horwitz to get up here and argue that it's not a psychotherapist and there's no record establishing that is just playing with the facts unfairly.

THE COURT: I come back to where I started from in a

sense, I don't see any reason why I need to change my order.

MR. HORWITZ: Well, your Honor, what if the referee looks at another relevant entry? This Court hasn't determined that that shouldn't be produced or identified. That is why Judge wolf directed me to bring this motion. He wants to know what to do when he finds other relevant entries in their diary.

THE COURT: Well, when you use the term "relevant entries" you mean on the issue of notice?

MR. HORWITZ: Mitigation of damages for example.

THE COURT: No, no, that really -

MR. HORWITZ: We sought that at the outset of this case.

THE COURT: Yes, but I must tell you, and to be perfectly candid with you, the only reason that -- for better or for worse, the only reason that I ordered the production of the diary to the referee was because I was convinced -- you convinced me that there was a relevance that outweighed the privacy interest on the issue of notice.

MR. HORWITZ: And, your Honor, I can make -- I could convince this Court I am confident on other documents if we knew what they were. How can I even make the argument without knowing what they are?

MR. AVANZADO: It has to be with respect to issues of the case. And I think all the issues of the case -- You don't need to know what's contained in the diary to talk about what issues of the case he thinks could overcome the right of

privacy. And notice was clearly what your Honor had in mind and in the notice -- in terms of notice, the only possible notice had to come between April and June of '94.

MR. HORWITZ: Your Honor, Mr. Fishburne's own testimony is, he didn't even find out that he hadn't gotten the part in this picture until July. So when they say cut it off in June 16, obviously if he made an entry, "Spoke to my agent today. He told me I didn't have the deal. That's no surprise because I knew there was no contract." That entry would be within the period that they're trying to withhold from us. And your Honor I'll give a very brief explanation as to why there may be other entries in here. A critical issue in this case, is that after Mr. Fishburne lost this part he was offered another role in the motion picture Water World, our contention is he had an obligation to mitigate his damages. There's an issue about why he turned down that part that we believe may be dispositive of the case as a whole. If there's an entry in there relating to why he turned down that other part, that would be extremely probative. They've not even been required to identify whether it's there or not. Let them say now to this Court that there is no entry in that diary related to Water World. I would like to hear that. They haven't said it to date.

MR. WHITE: Your Honor, to talk about what's in the diary would violate the privilege we're trying to protect.

MR. HORWITZ: Not subject matter.

MR. WHITE: That's the whole purpose. To talk about the contents of that diary -- Mr. Horwitz obviously -

MR. HORWITZ: That speaks volumes, your Honor, as to what's in there.

MR. WHITE: Excuse me, sir. Mr. Horwitz obviously fundamentally disagrees with the right of privacy in psychotherapy. We have presented extensive argument both to this Court and to the Appellate Courts that the very invasion -- and I can confirm to the Court that the order of this Court has already severely undermined the privacy and the sanctity of the man's psychotherapy. It has already had that effect. Mr. Horwitz doesn't care about that or doesn't believe it, but it's a fact. And for me to get up and tell you what's in the diary or what's not in the diary would just violate every principle we're trying to protect here. The Court made an order -- the Court made an order on September 14 limiting the production to entries regarding notice to Fishburne to get the movie. We're prepared to comply with that in toto immediately in order to protect our-
THE COURT: By doing what?

MR. WHITE: By producing the diary to Judge Wolf and letting him look for -- there's only one. He can find anything else he wants to on that issue. But for Mr. Horwitz now to claim that the entire diary is open for full scale discovery and it has no protection at all, it is inappropriate, it's inconsistent with the Court's prior order and that would be a far cry from what the Court did do.

MR. AVANZADO: Your Honor, just to clarify one more thing -- just to clarify one more thing.

MR. WHITE: Your Honor -

MR. HORWITZ: Two against one.

THE COURT: Listen, you should take comfort, I only let one of them speak at a time, so what's the difference?

MR. HORWITZ: Well they have a third attorney here and he can come up and speak as well.

MR. AVANZADO: Your Honor, our only concern, we're willing to produce the diary in toto to Judge Wolf. Your Honor, we can from your statement to me at the first hearing on this, that Judge Wolf would have the power to skip over the dates and not read completely the dates where obviously the parties were not in discussion. I think this diary was created in '93, I believe, and so there's entries in '93 that has absolutely nothing to do with this case; then I think, your Honor, that we would be comfortable with that. Judge Wolf is able to -- obviously he's a learned man who can separate the wheat from the chaff.

MR. HORWITZ: Your Honor, Judge Wolf is only interested in reading the part between April and August of 1994. I can't envision that anyone wants to see anything either before or after. That seems to be the relevant date.
It's interesting that Counsel represents to the Court there's no entry in there relating to the movie other than this one entry. But when we ask him a point blank question, is there an entry in that diary related to Water World or why Mr. Fishburne turned down that part, suddenly the privilege prevents him from responding to the Court. Your Honor, they've never identified -- this Court has to I think assume that there is such an entry in there.

THE COURT: Well, that's really tortured reasoning.

MR. HORWITZ: Then let them identify the entries so we can then know what we're talking about. But they can't have it both ways. They can't refuse to tell us what's there. Refuse to let the referee look at it and say I'm overreaching because I want to look at everything. I don't want to look at

everything. I don't want to see his innermost thoughts. I just want to see what's relevant to this case. We all have confidence Judge Wolf can separate the wheat from the chaff, but why deny him the opportunity -- if he finds something in there from his knowledge of the case is highly probative, why should that be withheld.

MR. WHITE: Your Honor -

THE COURT: Yes.

MR. WHITE: -- I'm the only person other than Mr. Fishburne and his therapist who has seen that diary, and I can confirm to the Court that all it is his innermost thoughts. To authorize any further invasion beyond the relevant time period that we've outlined, is a cruel invasion into this man's psyche. It's already been invaded by the Court, the Court has already entered, and Mr. Horwitz obviously doesn't care about that. But I can tell you from having read the diary myself, in person, it is painfully personal material.

MR. HORWITZ: His thoughts about Water World may very well be highly probative.

THE COURT: All right, let me just -- I really thought I would get this out of my system at least by the time I left the bench. Let me just reflect on this and go back and look at the papers. I don't need a great deal of time. By tomorrow morning I'll come up with a result.

MR. HORWITZ: Your Honor, with respect to our request about the trial date, would the Court -

THE COURT: Well, I heard Plaintiffs' counsel indicate

that they would like to retain the trial date.

MR. WHITE: That's the whole reason that we have agreed to produce what we have agreed to produce, your Honor, is to protect the trial date.

THE COURT: This is not your Court of last resort for a continuance. I would do it if there was an agreement. I really have no business adjusting trial dates over the objection of one party or more than one party.

MR. HORWITZ: It is the recommendation of the referee.

THE COURT: I understand.

MR. WHITE: Based on non-production and non-compliance. Once we have confirmed we've already complied --

THE COURT: Well my concern is, one -- and I don't know to what extent I'm prepared to change the order if I am prepared to change the order that I initially made. But assume for the sake of discussion that I don't, I don't know when you'd be prepared to turn over to Judge Wolf -- I don't know his availability. I don't know how soon he'd be prepared to reveal whatever he feels ought to be revealed.

MR. WHITE: Thursday afternoon, your Honor.

MR. AVANZADO: And we see him tomorrow morning.

MR. HORWITZ: If they don't comply with the order by turning over the diary, then we have to bring our motion for sanctions in front of Judge Wolf, he then issues a

report and recommendation, it comes back to the Court. His conclusion was, however it comes out there's no way this can get resolved before the trial date.

MR. WHITE: That is not true. That is absolutely not true.

THE COURT: Well, gentlemen, I have not read his recommendation.

MR. HORWITZ: That's what it says.

THE COURT: I find it unlikely that Mr. Horwitz would misrepresent the recommendation of Judge Wolf. It would be rather easy for me to pull it and -

MR. AVANZADO: Quite frankly, your Honor, the recommendation is based on his view that we would continue to pursue our appellate rights.

THE COURT: And not turn over the diary.

MR. AVANZADO: And not turn over -- that's correct.

MR. WHITE: Our offer to produce the diary comes after that report and recommendation, specifically to protect our trial date.

THE COURT: All right. Well, I -- Look, you're certainly free to move for a continuance if they're -

MR. HORWITZ: We have, your Honor, in front of this Court. There is a motion pending before this Court.

THE COURT: Well, before Judge Perez.

MR. HORWITZ: No, before this Court, your Honor. We have -- before this Court this day a motion to vacate the trial date.

THE COURT: Then I must have overlooked it. I thought I just had the two motions.

MR. AVANZADO: I think, your Honor, it was requested as relief.

THE COURT: All right, then -

MR. HORWITZ: It is in the caption of the motion. It is in the notice of the motion.

THE COURT: Let's assume that it's timely made. Isn't it a little bit premature for me to be granting the continuance based on what I've been told here and what you've been told?

MR. HORWITZ: Your Honor, if this Court were willing at this late date to reconsider its order and deem what they've done as full compliance, then perhaps we could stick with the trial date. But anything other than that -- and I'm confident this Court will not do that -- anything other than that will make it absolutely clear we're not going to have closure and resolution within the next four weeks in time to prepare for trial.

THE COURT: Well what if you have a resolution within the next seven days?

MR. HORWITZ: How, your Honor?

MR. WHITE: If your Honor sticks with the priority,

you'll have a resolution in 48 hours.

MR. HORWITZ: No.

THE COURT: Let's assume that I stick with the prior order -

MR. HORWITZ: Which requires him to turn over the entire diary

THE COURT: Yes.

MR. HORWITZ: -- which they've indicated they won't do.

MR. AVANZADO: We would do if your Honor confirms that Judge Wolf has the authority -

THE COURT: I've already ruled.

MR. AVANZADO: I understand that.

THE COURT: I don't need to make the same order twice.

MR. AVANZADO: But Judge Wold doesn't seem -- was uncomfortable because of arguments made by counsel.

THE COURT: You can explain it to him.

MR. AVANZADO: We will.

MR. WHITE: We can.

THE COURT: You know it's interesting, I've run into him on two or three occasions socially in the last month

and believe it or not we've not discussed this at any -- I mean it's interesting, I have to communicate through you, which is okay. It's just as well that it happened that way.

MR. WHITE: If the prior order is confirmed and there's no change, the order will be confirmed and complied with within 48 hours, probably -

MR. HORWITZ: There's still going to be a dispute about what this Court's order is. I can tell you that from the history of this case. They're going to take the position they need not turn over the entire diary even the portion through August. They are going to take that position.

THE COURT: At this point, based on the representations that I've heard, I don't think that it would be appropriate for me to continue the trial considering that it's the 13th of February. The trial is what, 34 days away, 33 days away.

MR. WHITE: Correct.

THE COURT: I'd be hard pressed to find at this point there was good cause. Now, based on the representation as to when the diary journal would be turned over to Judge Wolf and when Judge Wolf would most probably decide this issue, your motion might not -- if things don't pan out the way the Plaintiff claims they expect them to, then it might be appropriate.

MR. HORWITZ: But, your Honor, they are going to contend that this Court has now ruled that they need not turn over the entire diary.

THE COURT: I' m not sure what I'm going to do. What I'm saying is, your motion is not -- it's just a little bit

premature, not a lot premature.

MR. HORWITZ: This Court indicated two months ago when we were here and -

THE COURT: What else can I tell you?

MR. HORWITZ: I guess my concern is, I can't believe that this Court would not permit us some opportunity to address the discoverability of other entries whether now or by some other motion or --

THE COURT: That's what I'm going to contemplate. I want to -- as much as I hate to I'm going to revisit this this evening.

MR. HORWITZ: I apologize that we've burdened the Court with this extra work.

THE COURT: No, you' re doing your job. That's what I'm supposed to be doing. Sometimes it gets a little bit too much, that's all.

MR. HORWITZ: If the Court is inclined to enforce its prior order requiring the entire diary to be turned over or contemplate at least some mechanism by which we could litigate the issue of whether some other relevant entries might be discoverable. I would ask -

THE COURT: Well you've made your -- look, it's either going to be thumbs up or thumbs down after I review the pleadings again -- the briefs again.

MR. HORWITZ: If it's a partial thumb up, or whatever it might, if the Court would at least reconsider -- or not

reconsider -- consider the motion on--

THE COURT: Well you've asked me to do that.

MR. HORWITZ: -- the motion on the trial date, that's all. I would think the Court should consider that as part of its determination.

THE COURT: I think you're probably about a week premature from a Court being in a position to say the case should be continued, the trial should be continued or it shouldn't.

MR. WHITE: Your Honor, if the Court were, God forbid, the entire diary be published in the Santa Monica Register and we did it tomorrow, we could keep our trial date. That's within our power.

THE COURT: All right, I'll get notice out tomorrow.

MR. WHITE: Thank you, your Honor.

THE COURT: You're welcome.

MR. HORWITZ: Thank you, your Honor. (Proceedings in the above-entitled matter were concluded.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B HON. ALAN B. HABER, JUDGE

LAURENCE FISHBURNE et al.,No. SC 031 787

Plaintiffs,

vs .

CINERGI PRODUCTIONS, INC., et al.,
Defendants.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES ss

I, HORACE W. BRIGGS, a duly designated transcriber, do hereby declare and certify under penalty of perjury that I have caused to be transcribed the portion of tapes 1 and 2 which were duly recorded in the Superior Court of the State of California, County of Los Angeles, Department WE B, on the 13th day of February, 1996, in the above-mentioned case, and that the foregoing 27 pages comprise a true and correct, accurate transcription of the aforementioned tape.

Dated this 16th day of February, 1996.

_____
Transcriber

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February 16, 1996

Via Fax and US Mail

The Honorable Leonard s. Wolf
Judge of the Superior Court (Ret.)
413 Howland Canal
Venice, California 90291

Re: Fishburne v. Cinergi

Dear Judge Wolf:

Enclosed herewith is a copy of Judge Haber's recent order dated February 14, 1996, denying all request for a modification or clarification of his prior order regarding your in camera review of Mr. Fishburne's psychotherapy diary. As Judge Haber ordered, "There is an insufficient showing for any modification or clarification, and no clarification is necessary."

By virtue of this order, Judge Haber has emphatically reaffirmed his prior minute order, dated September 14, 1995, which contains the following explicit limitation on the only portion(s) of Mr. Fishburne's psychotherapy diary that are not to be redacted:

> "Discovery referee to redact everything except notice of Fishburne to get movie role..."

As you know we previously provided to Your Honor (and Your Honor ordered production to defendants' counsel) the diary entry dated May 10, 1995, reflecting the notice to Mr. Fishburne on that date, when Mr. Fishburne wrote:

> "Good news on the work front. It looks like I'll Be playing opposite Bruce Willis in Die Hard III. I'm so grateful and happy to have been blessed with such good fortune. All I could think to do was get down on my knees and say a prayer."

We are prepared to provide Your Honor with Mr. Fishburne's psychotherapy diary, for your in camera review, at your earliest convenience. (Having personally reviewed the diary myself, I can assure you that your in camera review will confirm that the May 10 entry noted above is the only entry that is not to be redacted, pursuant to Judge Haber's reaffirmed order.) We respectfully request that you please contact the undersigned, as soon as you are able to schedule an in camera review, consistent with Judge Haber's order.

Very truly yours,

Andrew M. White
of CHRISTENSEN, WHITE,
MILLER, FINK, JACOBS,
GLASER & SHAPIRO, LLP

cc: Howard L. Horowitz, Esq.
(Via Fax and US Mail)

COUNTY OF LOS ANGELES
SUPERIOR COURT OF CALIFORNIA

Date: February 14, 1996	L. HERNANDEZ
HONORABLE	Deputy Clerk
ALAN B. HABER JUDGE	Electronic Recording
HONORABLE	Moniter
JUDGE PRO TEM	Reporter
J. Jimenez Deputy Sheriff	(Parties and Counsel
Court Attendant	check if present)
	NONE

SC031787	Counsel for
LAWRENCE FISHBURNE-ETC ET AL	Plaintiff
VS	NO APPEARANCES
CINERGI PRODUCTIONS, INC-ETC-ET AL	Counsel for Defendant

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER

Plaintiff's motion for order modifying prior order re: production of psychotherapist diary and Plaintiff's motion to modify Court order requiring in camera inspection came on regularly for hearing on 2-13-96. The matter was argued and taken under submission. The Court now renders its decision as follows:

Denied. There is an insufficient showing for any modification or clarification, and no clarification is necessary.

A copy of this minute order is sent via U. S. Mail as follows:

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MINUTES ENTERED
Dept. WE B 02/14/96
COUNTY CLERK

MINUTE ORDER

Supreme Court, U.S.
FILED
MAR 21 1996
CLERK

No. 95-1262

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LAURENCE FISHBURNE and THE LOA PRODUCTIONS, INC., a New York corporation,

Petitioners,

v.

CINERGI PRODUCTIONS, INC., a California corporation,
CINERGI PICTURES ENTERTAINMENT INC., a Delaware corporation,
ANDREW G. VAJNA and RANDOLPH M. PAUL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of California

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I
INTRODUCTION

Petitioner Laurence Fishburne submits this reply brief in support of his petition for writ of certiorari on the sole issue of purported "mootness" raised by Defendants' opposition brief. As discussed below, and contrary to Defendants' contentions, issues raised by Mr. Fishburne's petition are not moot. Despite Mr. Fishburne's decision to produce the diary for an *in camera* inspection in compliance with the order of the California trial court, Mr. Fishburne's constitutional rights are still subject to attack through discovery orders sought by Defendants -- who have again announced that they are in fact going to seek expansion of the already overbroad trial court order which required Mr. Fishburne to produce his psychotherapist diary for *in camera* inspection. Moreover, the well recognized exception to the mootness doctrine that issues capable of repetition but which evade review are proper subjects for this Court's determination. Mr. Fishburne's right to privacy will continue to be compromised unless the trial court's order in violation of Mr. Fishburne's constitutional rights is voided. Under these independent bases, Mr. Fishburne's constitutional rights must be adjudicated by this Court to provide guidance to lower federal courts and state courts which address these issues during civil discovery.

For these reasons, as well as those stated in Mr. Fishburne's petition, Mr. Fishburne respectfully requests that this Court grant his petition for writ of certiorari.

II
MR. FISHBURNE'S RIGHT TO PRIVACY WITH REGARD TO HIS PSYCHOTHERAPIST DIARY IS NOT RENDERED MOOT BY HIS DECISION TO PRODUCE IT FOR IN CAMERA INSPECTION AS ORDERED BY THE CALIFORNIA TRIAL COURT

"In general a case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S. Ct. 1202 (1980)). Thus an issue is *not* moot if it remains "live" and one party (*i.e.* Mr. Fishburne) continues to have a legally cognizable interest in the outcome.

The issues presented by this petition for writ of certiorari -- the constitutionally protected interests Mr. Fishburne maintains in his diary -- remain "live" in two respects despite his decision to produce the psychotherapist diary for *in camera* inspection pursuant to the order of the California trial court.

First, Mr. Fishburne's relationship and ability to communicate with his psychotherapist continues to be affected by the order of the trial court. Mr. Fishburne's reasonable expectation of privacy in his psychotherapist-patient relationship has been invaded by the trial court order to produce his diary for *in camera* inspection. Without a reversal from the Court, the trial court order violating Mr. Fishburne's constitutional rights will continue to be a legal barrier to Mr. Fishburne's assertion of his rights in the future. Moreover, Mr. Fishburne must now live in fear that his written communications, or any other aspect of his relationship with his psychotherapist, will be compromised

during any litigation in which he is involved. Without the relief sought by this petition, Mr. Fishburne's ability to relate his innermost thoughts and confidences to his psychotherapist continues to be compromised.

Moreover, Defendants in this action have already indicated their intent to seek further discovery from Mr. Fishburne's psychotherapist diary. Mr. Fishburne's constitutional rights are still at risk as a result of further discovery of information contained in the diary -- all with a constitutionally void trial court order in place which confirms Mr. Fishburne's vulnerability to such attacks. Thus, Mr. Fishburne's petition before this Court cannot possibly be moot.

III
THE EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES TO MR. FISHBURNE'S RIGHT TO PRIVACY IN HIS DIARY ENTRIES

Even if Mr. Fishburne's petition were technically "moot," this Court has recognized an exception to the mootness doctrine when an issue "is capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 148, 96 S. Ct. 347 (1975). This standard applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. All of these elements are present here.

Defendants have already indicated their intent to seek further discovery from Mr. Fishburne's psychotherapist diary. In light of the trial court's order requiring an *in camera* inspection in violation of Mr. Fishburne's substantial

constitutional rights, Mr. Fishburne's constitutional rights remain at risk from such attacks unless this Court declares the civil discovery of such matters to be an unconstitutional infringement upon Mr. Fishburne's rights. Mr. Fishburne did not have the opportunity to await the final adjudication of this petition in the trial court.[1/]

Moreover, Mr. Fishburne's petition presents the issue of whether communications with a psychotherapist by way of a diary of journal is subject to civil discovery. Because of his substantial travel schedule, Mr. Fishburne can only communicate with his psychotherapist by way of his diary. The trial court's order below, requiring the *in camera* production of this diary, invades Mr. Fishburne's constitutional rights of privacy and interferes with his relationship with his psychotherapist. Thus, this Court has the opportunity to review a situation "capable of repetition, yet evading the view" -- whether written communications by way of a diary is protected by constitutional rights of privacy and a federal psychotherapist-patient privilege. There is no question that Mr. Fishburne faces similar further attacks upon his psychotherapist diary in the context of civil litigation. Accordingly, even if Mr. Fishburne's petition is technically "moot," the well-recognized exception to the mootness doctrine applies. This Court must grant Mr. Fishburne's petition so that lower courts will have guidance on these issues.

---

1. In fact, Mr. Fishburne complied with the trial court's order to produce the diary for *in camera* inspection solely to preserve the then-scheduled trial date of March 18, 1996. The trial court nevertheless ultimately continued the trial date until September 1996 upon Defendants' motion for a continuance.

IV
CONCLUSION

For the reasons stated in the petition for writ of certiorari and in this reply brief, the Court is respectfully urged to grant the writ of certiorari.

Respectfully submitted,

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